

## Chapter VII

# Maritime War Zones & Exclusion Zones

by  
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### I. Introduction

Questions of legality apart, nations' experience of maritime war zones or exclusion zones has demonstrated the utility of these juridical/strategic devices for both offensive and defensive purposes.<sup>1</sup> For example, in World War I and in World War II both sides created prohibited war zones for offensive reasons. On the other hand, in the Russo-Japanese War (1904-1905), the Japanese Government created defensive war zones.<sup>2</sup> Similarly, both Argentina and the United Kingdom created what each belligerent claimed to be its defensive war zones in the Falklands ("Malvinas") Islands Conflict of 1982.<sup>3</sup> States declare maritime exclusion zones offensively when they seek to interdict shipping into a target state or port in order to embargo that country's trade, especially its trade in war materiel and food. They declare them defensively when they seek to interdict shipping, or selected types of shipping (for example, warships and merchant ships carrying military supplies, or acting as auxiliary naval ships), from entering approaches to the territory they are defending from invasion.

With regard to offensively-oriented naval exclusion zones, the *Commander's Handbook on the Law of Naval Operations* (Naval Warfare Publication 9)<sup>4</sup> correctly points out that, while the traditional rules of blockade required a "relatively 'close-in' cordon of surface warships stationed in the immediate vicinity of the blockaded area,"<sup>5</sup> the contemporary development of weapons and tactics creates a situation which cannot be reconciled with this means of enforcement. NWP-9 continues:

The so-called long-distance blockade of both World Wars departed materially from those traditional rules and were justified instead upon the belligerent right of reprisal against illegal acts of warfare on the part of the enemy.<sup>6</sup>

NWP-9 also points out the difficulties, indeed, impossibilities, of an in-shore blockade in light of modern weapon systems and platforms, "particularly nuclear-powered submarines, supersonic aircraft, and cruise missiles."<sup>7</sup>

Without committing itself as to whether contemporary methods and weapons for waging war at sea have brought about legal change in the context of the offensive use of restricted or prohibited war zones, NWP-9 concludes its discussion of this topic with the observation that:

The [United States] blockade of Haiphong and other North Vietnamese ports [was] accomplished by the emplacement of mines, [and] was undertaken in conformity with traditional criteria of establishment, notification, effectiveness, limitation, and impartiality.<sup>8</sup>

While the mining of the North Vietnamese harbors may have observed some of the traditional, maritime, siege-type, requirements of blockade,<sup>9</sup> and complied with Hague Convention (VIII) Relative to the Laying of Automatic Submarine Mines<sup>10</sup> it did not entirely meet the traditional requirements of a close-in blockade since a blockading fleet "within visual range of the coast"<sup>11</sup> was not constantly present outside those ports. Indeed, the system of "Market-Time" (which related only to the coast of South Vietnam) apart, the United States tended to rely on the air arm as well as on surface warships (under Operation "Sea Dragon") for purposes of blockading North Vietnam.<sup>12</sup> Also the use of floating mines activated by such agencies as sound and vibration was not in compliance with Hague Convention VIII.

When reviewing the resort to maritime exclusion zones as instruments for justifying attacks against unarmed merchant ships, this paper will examine the strategies of the proclaiming states asserting rights to establish such zones. While both defensively and offensively used exclusion zones are instruments for logistical strategies,<sup>13</sup> that is, strategies directed to the denial of supplies, reinforcements, and replacements to the enemy, these may be conducted in terms of either "persisting" and "holding" or alternatively "raiding" strategies.<sup>14</sup> It will be a further thesis of this paper that to establish maritime exclusion zones merely for the purpose of implementing raiding strategies, whereby power is exercised not by the maintenance of control but by indicating an intention to engage in adventitious attacks on random shipping, is invalid. In addition, such a strategy involves a politically contradictory posture. Since the assumptions underlying policies of establishing exclusion zones include the need for effectiveness and persistence, the fortuitous nature of zones enforced only by raiding strategies reveal them as being only haphazardly enforced. Simply to enforce a zone at random times and engage in random attacks arises from the lack of an essential ratio of power to space and time which the sufficient mastery of the area and effective exclusion of the enemy require. Such a result can only be achieved by a persisting strategy. This calls for an adequate ratio of power to space and time such that control of the area can be completely assured. In addition to the issues of the strategies involved (that is, offensive/defensive; logistical/combat; raiding/persisting) there are, of course, other variables that need to be borne in mind: the

reasonableness of the zone both in size and in relation to the object(s) the proclamation(s) seek to achieve; its effectiveness in terms of contemporary weapons technology; and proportionality both in terms of the ratio of force to space and time and in terms of enforcement and sanctions.

This chapter will review, first, the legality or illegality of prohibited or exclusion zones in terms of persisting and raiding strategies, that is, resort to either or both strategies in order to deny the enemy's access to the economic resources; and, secondly, in terms of such zones when they are resorted to for defensive persisting strategies which reflect their use "as a moat defensive to a house".<sup>15</sup> In this latter mode, the commander's object is to exclude the enemy's shipping from an ocean area on the presumption that the excluded ships may otherwise attack the state through, or across, the proclaimed zone. In all cases where these strategies are used, the issue of military utility, targets, and means and methods will be treated as essential to the analysis. Furthermore, the importance of the principle of distinction and of the obligation to respect non-participating, neutral shipping, will be stressed. This final criterion is variable and dependent on a number of factors such as the geographical location of the zone proclaimed, the density and quantity of the traffic affected, and the geographical extent of the hostilities.

In the pages that follow a considerable emphasis will be laid on the use of maritime prohibited zones for purposes of carrying out, or attempting to carry out, logistical strategies. But, while there are possibly more striking examples of this (that is, logistical) use of the zones under review, it must be stressed that the zones are used for defensive and offensive combat strategies as well. In this latter (combat) connection they can be useful as adjuncts, rather like the use of mine fields on land or sea by an attacking force. Their function, in this last scenario, is that of diverting an adversary into a "killing ground."

## II. A Review of State Assertions of Maritime Exclusion Zones in Times of War or Armed Conflict

### A. *The Russo-Japanese War, 1904-05*

The investigator today, seeing the proliferation of exclusionary zones in conflicts which have arisen from very divergent and disparate circumstances, may be surprised that there was little cavil regarding what has been denominated as the earliest declaration of such a zone. In the Russo-Japanese War, 1904-05, Japan established maritime defense zones which Hall described in the following terms:

Prior to the outbreak of war with Russia, the Japanese Government empowered the Minister of Marine, or the Commander-in-Chief, . . . to designate certain areas adjacent to the islands of the Japanese Empire as "Defense sea areas." . . . On and after

the outbreak of war twelve or more of such areas were notified, the boundaries of which in some cases ran as far as ten miles from land.<sup>16</sup>

In enforcing these defensive zones by its persisting holding strategy, the Japanese Government evinced an adequate ratio of force to both time and space. This effectiveness enabled that country's naval forces to seize and condemn, as prize of war, the neutral French ship *Quang-Nam* on the ground of her presence within the prohibited area.<sup>17</sup> In addition to stressing the historical and legal importance of the Japanese Navy's persistently maintained and effective defense zones, note should also be taken of the establishment, in the Russo-Japanese War, of an early forerunner (created by the necessity of a then contemporary technological innovation of radio) of the 1982 British Moving Defensive Area (or "Bubble") concept<sup>18</sup> for the protection of her forces in the South Atlantic against both attack and intelligence-gathering. In the earlier conflict, namely the Russo-Japanese War, the British ship *Haiman* had been fitted with a DeForest wireless telegraph apparatus. She also had a representative of the *Times* of London on board. Messages were sent over this apparatus in cypher to Wei-Hai-Wei (at that time a British possession on the Shantung Peninsula of China and located close to the sea areas where both belligerents were conducting their naval operations). These messages were transmitted to London over a neutral cable and thus were available for newspaper publication.

The *Haiman* was visited several times by Japanese warships and once by the Russian cruiser *Bayan*. She was instructed not to engage in broadcasting naval operations. Subsequently, however, as a result of the concerns of Admiral Alexieff, the Russian authorities in the Far East promulgated, on April 5, 1904, an instruction to the effect that correspondents broadcasting within the zone of operations of the Russian fleet should be treated as spies. The severity of the sanction imposed in the promulgation was adversely criticized in the British House of Commons. In the House there was general agreement that the Russian Admiral and the Czar's Viceroy in the Far East should, rather, have had recourse to the remedies for unneutral service (confiscation of the ship, her cargo, etc.), rather than accusing and punishing the offender for the capital crime of espionage<sup>19</sup> even if the correspondent had been found, contrary to the tenets of his profession, to be transmitting information to the Japanese authorities. It should be noted, however, that the debate only criticized the threat to resort to the extreme penalty, and did not question the authority of both fleets to restrict news gathering and dissemination on the high seas, despite neutrals' expectations that the belligerents would respect their journalists' right to enjoy those freedoms. Clearly, the belligerents' encroachments on the neutral states' privileges were acceptable, provided they remained reasonable and balanced as between the interests in play. On the other hand, Admiral Alexieff remained unmoved

by the neutrals' protests. Hence, the Russian position, since it threatened the extreme sanction of death (probably by hanging),<sup>20</sup> rather than the penalty appropriate for non-neutral service, should be treated as failing the reasonableness and proportionality tests.

After declaring war on Germany in April 1917, the United States issued orders similar to the Japanese 1904 regulations. They controlled navigation in defined areas and around named American ports. These were maintained by an effective persistent holding and defensive strategy, despite the fact that, at some points the distance of the circumference of an area from a given center was as far as ten miles<sup>21</sup> (a similar distance to that in the Japanese orders). Regarding these orders, Hall observed that:

The Japanese and American orders were based on the principle of defense, and it appears to be on such a principle that claims to establish war zones or areas of the high seas from which neutrals may be excluded can be supported. The legitimacy in any given case must be determined by circumstances.<sup>22</sup>

Hence it may be asserted that exclusionary zones created purely for defensive purposes, and provided they are persistently maintained and rendered effective by virtue of the ratio of power to space and time, and carry proportionate sanctions for breach, have for some time now, come to have been approved by the international community. This approval is testified to by the lack of protest or resistance to both the Japanese and American proclamations and an agreement among publicists that they fall within the test of reasonableness.<sup>23</sup> But today the types of exclusion zones calling for legal analysis involve more complex methods and tactics for enforcement, cover far larger sea areas, and are established for many more diverse ends than was the case with these early and relatively modest and straightforward forerunners.

### ***B. World War I, 1914-18 and The Interwar Period***

In World Wars I and II prohibited zones were set up by both sides for the purpose of staging a ruthless and almost effective aggressive logistical strategy.<sup>24</sup> Their objects were to blockade the enemy to bring him to his knees by starvation and the denial of war materiel. This is, of course, the complete opposite of the resort to exclusion zones for defensive purposes by the Japanese in 1904-05. As has already been pointed out, both of the blockades of World War I were denounced as illegal by their target (enemy) states. Indeed, while certain limited forms of maritime exclusion zones have, in recent years, been increasingly achieving recognition as lawful, in the period of the two World Wars and the interval between, only those maritime zones which were modest as to purpose and strictly limited as to area (such as those established by Japan in 1904 and the United States in 1917) were accepted as lawful. Hence the German unrestricted submarine warfare in the North Atlantic and the Anglo-

American "Starvation Blockade" were claimed to have been justified by their executants as constituting appropriate reprisals. Indeed, it should be noted that the accepted doctrine and practice regarding belligerent reprisals has long been predicated on the otherwise unlawfulness of the conduct constituting the reprisal. That conduct becomes justified only by the previous unlawfulness of the adversary's original act. Despite its intrinsic illegality, the act of reprisal is claimed to be justified as a sanction against that prior illegal act and becomes legitimate as a means of putting pressure on the target state to desist from continuing in its prior unlawful conduct.<sup>25</sup>

The maritime exclusion zones created by the belligerents started with the stigma of unlawfulness mitigated only by the previous unlawfulness of the adversary's conduct giving rise to the drastic response of resorting to reprisals. Neither party, however, claimed that new weapons and tactics had given rise, as a matter of necessity, to the emergence of a customary norm justifying their prohibited zones. Furthermore, each side argued that the other's reprisal (that is, maritime exclusion zone) was illegal even as a reprisal.<sup>26</sup> In addition, an assertion of customary international law justification would, most probably, have been met with outrage and derision by the neutral states (which, down to April 2, 1917, included the United States of America). But the purpose of this chapter is to learn whether, since 1918, subjects of the international legal order have come to recognize, as customary international law, and aside from the very questionable arguments based on reprisals, at least some maritime prohibited zones which are established in time of war. Such an inquiry calls for the substantiation of criteria for establishing the validity of certain of these tactical and strategic devices. The point of referring to justifications predicated on reprisals was to indicate merely that neither party, and especially the United Kingdom, was prepared to risk that its policy, if failing the test of legality on the basis of the emergence of a customary norm, would draw upon itself the stigma of illegal conduct based on a spurious argument. But nowadays such arguments in terms of reprisals are, in light of emerging customary norms, largely anachronistic.

### **(1) Traditional Blockade—A Time-Honored Logistical Strategy**

Revisiting the older and well established rules, the investigation which follows will begin with reviewing the legal institution of blockade as it had evolved over some two centuries previous to World War I, and had been defined, in the nineteenth century and early twentieth century, by treaty. Originally, the requirement was that a blockade to be valid and opposable to neutral shipping, had to be "close-in and, of course, persisting in terms of the necessary ratio of force to space and time." While weapons did not render such a blockade suicidal (as today's military arsenal clearly would), it was, in the heyday of sail, not without considerable risks and challenges to the blockading commanders. This is illustrated in a British naval historian's review of the "close-in" blockade of Brest during the French Revolutionary

and Napoleonic Wars reflecting as it did both a persisting holding strategy and a necessary ratio of force to space and time:

Brest, where the principal fleet of the French was lying, commanded by Admiral Ganteaume is in the north-east corner of the Bay. Outside it is a rocky coast and a wicked stretch of sea, foggy, cold and stormy. Strong tides set through the narrow sounds inside the Isle of Ushant, and the prevailing wind, southwesterly, blows onshore with the whole of the open Atlantic behind it to build up a sea and swell. Even the sailing ships of modern times, such as they are, are advised to keep well offshore. Collingwood, who commanded the blockade in the '90s, had said that this coast was more dangerous than a battle once a week.

Yet to keep the approaches to Brest under observation, Collingwood had to be close. Ships of the line in those days were unhandy vessels, slow to windward and slow to go about. Embayed on a lee shore with an incoming swell, they could never be sure of clawing off again. Caught in a calm, they were helpless against a tide that might set them into unnavigable sounds. Yet night and day, summer and winter, Collingwood and his captains stood off and on that shore, estimating the tidal streams and currents, constantly solving the problems of navigation and ship-handling—and not merely in a single ship, but in a whole fleet of them. No modern sailor would dare to explain how they did it; the art of sailing such ships is long forgotten. Even then, the achievement amazed the French, who looked out in every dawn and saw the sails there. There was only a single exception. In heavy westerly gales, they ran for shelter in Plymouth Sound, a hundred and fifty miles across the Channel—because in a westerly gale, the French could not possibly beat out of harbour. But whenever the wind showed signs of moderating, they were back on station before the French could stir.<sup>27</sup>

But severe a challenge as the risks of winds, waves, tides and rocks were in the days of sail, they challenged, to a very high degree, proficiency in seamanship. They did not partake of the same order of inevitable destructiveness that would be the result if ships were to engage in a “close-in” blockade today, when modern-day airborne and submarine radar-directed, heat-seeking missiles, or other forms of the “smart” weapons of contemporary arsenals would doom the enterprise. The destruction wrought on *H.M.S. Sheffield* by an Exocet missile (even though the ship was not engaged in any “close-in” blockade) during the 1982 Falklands Conflict illustrates the vulnerability of modern warships to even rather obsolescent, cheap and easily made post-World War II missile-type weapons. Furthermore, the sad error of *U.S.S. Vincennes* in July 1988 underscores the difficulties of command that modern weaponry can create. (Although the *Vincennes* was not involved in an official blockade, she was operating in a populous and geographically restricted area with busy air and sea lanes. The incident illustrates the technological/moral/and social problems with which a commander in a close-in blockade situation of today would be faced.) Finally, it is suggested that a persisting effective blockade, reflecting an adequate ratio of force to both space and time, can be achieved without literally complying with the

nineteenth and earlier centuries' criterion for effectiveness of being "close-in."

Again, technology has changed the exercise of the right of visit and search quite basically, as McDougal and Feliciano have pointed out regarding the present-day difficulties:

It scarcely needs demonstration to show that the successful exercise of these procedures at sea, in the context of modern naval and air warfare, presents the most formidable difficulties. The warship attempting to stop, board and search a suspected enemy or neutral vessel becomes, in the course of such an attempt, highly vulnerable to air and submarine attack. Moreover, the size of present-day ocean carriers and the volume of cargo carried make any inspection of the cargo that goes beyond the perfunctory examination of shipping manifests practically impossible without modern dock facilities.<sup>28</sup>

The authors argue, accordingly, that the practice of diverting suspected merchantmen to designated control points that has arisen in response to the challenge that the foregoing difficulties have posed, is reasonable and hence valid. They argue, further, that the same rationale applies to the diversion of suspect vessels before or without the formality of a boarding to effect the visit and search on the high seas.<sup>29</sup>

In comparison, the 1856 Declaration of Paris authoritatively asserted that a state, to ensure that its blockade was valid and opposable to neutral ships captured as prizes of war for breaching the blockade, was obliged to ensure that its blockade was "really effective."<sup>30</sup> This obligation was repeated in the Declaration of London, 1909,<sup>31</sup> which, however, was never ratified by Great Britain and never entered into force as a binding instrument for any of the states that negotiated it. But a number of countries did evince considerable sentiment in favor of its terms, as exemplified, for example, by the United States' proposal in August 1914 that the belligerents comply with it. The Entente Powers found, on analysis, however, that Germany and Austria could import unlimited quantities of foodstuffs and other conditional contraband through the neutral state of the Netherlands (which took the view that the combination of her declaration of neutrality, together with the Convention of Mannheim of 1868 regulating the navigation of the Rhine, completely tied her hands).

On the other hand, article 34 of the Declaration would permit an enemy of the United Kingdom to stop all exportation of food from a neutral state to that country. Indeed, it was prior to the outbreak of the First World War that intense public agitation in Great Britain against, *inter alia*, article 34, that had created so great an opposition to that country's signature, that it resulted in the United Kingdom Government's reversal of its position on the Declaration and in its refusal to ratify the agreement.<sup>32</sup>

This very serious departure by Great Britain and France in their statements of policy in August 1914<sup>33</sup> from the principles of the unratified convention



provided Imperial Germany with the basis for her claim to engage in her "long distance blockade" by means of indiscriminate submarine warfare, and of mining the approaches to the British Isles. The German submarine policies were stated to be reprisals against the British and French rejection of the 1909 Declaration.<sup>34</sup> In reality the German submarine logistical strategy, which began with a smaller submarine fleet, in 1914, than that of the United Kingdom (28 for Germany and 56 for Great Britain) at the outbreak of war,<sup>35</sup> never ceased, despite the concentration of her naval effort on submarine warfare, to be a raiding logistical strategy carried out, even at its height of success (March-August 1917<sup>36</sup>) by random attacks that were no better than raiding assaults and never could be effectively sustained by maintaining an adequate ratio of force to space and time.

Contrariwise, the Entente Powers, on November 4, 1914, justified their long distance blockade, not as a legally permitted logistical strategy, but only on the basis of their claim to resort to belligerent reprisals—namely in retaliation for Germany's sowing contact mines in the open sea around the British Isles contrary to the Hague Mining Convention (Convention VIII).<sup>37</sup> On the other hand, an alternative basis to the questionable one of belligerent reprisals might have been supported in terms of an emerging customary rule. The case for the Entente Powers' long distance blockade might have been argued in terms of the geographical expansion of the blockade owing to emerging technological exigencies coupled with a demonstration of its still being "truly effective," just as was the "close-in" blockade of the age of sail. Such a blockade could be shown to constitute a persisting logistical strategy with an adequate ratio of force to space and time. Hence it was effective within the meaning of paragraph 4 of the 1856 Paris Convention.<sup>38</sup>

## **(2) The Test of "Effectiveness"**

Although becoming increasingly anachronistic, given changes in weapons technology, the test of effectiveness was seen, for example, in the diplomatic exchanges during World War I down to April 1917, as a term of art deriving from the Paris and other Declarations and international agreements. Hence, effectiveness was frequently represented as requiring the positioning of a naval force on station, so that it prevented access into and egress from the zone (port, estuary, coast, etc.) blockaded. It was out of this requirement, in a time before radar, radio, aircraft, and submarines, that the notion developed that the test of "effectiveness" could call for a cordon of anchored men-of-war. But, as the experience of World War I showed, an effective blockade could be maintained at a considerable distance from the enemy's ports. For example, the Anglo-American mine barrier across the northern end of the North Sea provided as effective a blockade as did the presence of the British Grand Fleet in Scapa Flow to bottle up the German High Seas Fleet in the Jade River.

If conduct which was regarded as impermissible becomes viewed as legally permissible, a new regime of customary international law must be shown to have come into being; provided that the twin requirements of a constant and "uniform usage practiced by the states in question, and that this usage is the expression of a right . . ."<sup>39</sup> are satisfied. In the case of a change in the detonations of the qualifier, "effective," such a new customary rule may well be justified on the basis of the confrontation of the reality of the new technology with traditional law, rendering obsolete the old rule of a close-in stationing of the blockading fleet. New situations and new weapons, through necessity, may be shown to have given rise to new practices that still satisfy the requirement of effectiveness, whose connotation remains unchanged; that is, it satisfies the requirement of being a persisting holding logistical strategy. In these circumstances necessity reinforces the mental element of determining the emergence of a customary rule. But, despite the resort by both sides in World War I to systems of prohibited zones in which neutral merchant ships would be controlled on the British and French side by surface forces (with an ever-increasing list of contraband being used to justify their seizure) and, on the other, by the threat of being sunk on sight, by the end of that war there was no consensus leading to any recognition of prohibited maritime zones as lawful. Indeed, a great negative reaction had set in, and while the British "Starvation Blockade" was widely denounced by publicists (and especially German scholars writing on the subject), the German indiscriminate submarine warfare was even more widely stigmatized for its ruthless inhumanity.

The diplomatic interventions of the United States, prior to her declaration of war (April 2, 1917) against Germany in World War I, both in terms of her suggestions and proposals to both belligerents, and in terms of the diplomatic protests she lodged with both sides, are of considerable interest in evaluating the possibility of the emergence of a customary international norm. It is also germane to arguments that contemporary diplomacy operated with a strong negative impact on such a possible development.

On August 6, 1914, the United States proposed to both of the belligerent coalitions that they should adopt the Declaration of London of 1909 as it stood. The Entente (in effect Great Britain and France)<sup>40</sup> announced that they would apply the Declaration, but with very serious departures from it regarding conditional contraband. Germany, on the other hand, notified the United States on August 22, 1914, that she was willing to apply the Declaration of London in its entirety.<sup>41</sup> On receipt of these replies the United States protested vigorously against the British Order in Council of August 20, 1914. Thus, on October 30, 1914, the August 20 Order in Council was cancelled and replaced by a further promulgation, making important concessions to the United States. But, on December 26, 1914, the United States made a further vigorous protest. While these early exchanges did not relate to "long distance

blockades" as such, they were soon followed up by United States proposals against that form of Allied control of neutral shipping suspected of trading with the Central Powers. On December 28, 1914, the United States became the spokesman of neutral powers and again protested against the systematic enforcement of the diversions of neutral ships which were required by the Entente's economic measures. The United States argued that those systematic diversions were tantamount to a general presumption that all diverted ships were carrying contraband, and that such a presumption was contrary to international law.

Taking advantage of the neutrals' angry reaction to the Entente's system of diverting neutral shipping, and the Allies' rejection of the key articles of the Declaration of London of 1909 (for example article 34), Germany on February 18, 1915, promulgated her first declaration of indiscriminate submarine warfare. She claimed that this form of warfare was permissible as a reprisal against the Entente's refusal to abide by the Declaration of London and their systematic deviation of neutral shipping. She declared that any hostile merchant ship encountered in British or Irish waters, including the English Channel, would be sunk without warning. Neutral ships navigating in those waters were stated to be at risk, on the ground that merchant ships of the Entente had, on several occasions, hoisted neutral colors and "mistakes could not be avoided."<sup>42</sup>

### **(3) The Effect of the United States Entry into World War I**

In response to the German declaration of unrestricted submarine warfare in early 1915 the United Kingdom proclaimed the Order in Council of March 11, 1915 (which was followed by the French decree of March 11, 1915). Regarding those promulgations, Guichard tells us that:

Up to that date indeed France and England had confined their attention to contraband alone; from 11th March 1915 they held themselves free to bring into their ports any goods the destination, ownership, or origin of which was presumed to be hostile. In other words all direct trade between Germany and the Powers overseas was put a stop to.<sup>43</sup>

Originally, this Order-in-Council was applied only to sea areas east of the 15th degree east longitude and north of the 30th degree north latitude. Subsequently this zone was extended to sea areas east of the 30th degree west longitude. In effect, despite British and French insistence to the contrary, they had, in effect, created a maritime prohibited zone in relation to neutral vessels that they (the Entente Powers) believed to be trading with, or carrying goods to and from, the Central Powers.<sup>44</sup> Furthermore, they were able to maintain this logistical strategy with a persisting ability to hold the area and maintain it effectively.

In March, April, and July 1915 the United States, in effect, charged the Entente Powers with illegally interfering with neutral commerce. On October 21, 1915, this country protested strongly against the steps that the

Entente Powers had taken to interdict neutral trade with the Central Powers.<sup>45</sup> On July 7, 1916, moreover, the Entente Powers, over France's misgivings, abandoned their voluntary acceptance of the principles of the Declaration of London. But the period of United States' protests against the Entente Powers' blockade ended after her entry, on April 2, 1917, into World War I. Indeed this country brought a much needed, added, strength and guiding force to the Allies' blockade. Guichard tells us that:

The attempts made to bring unity of direction between France, Great Britain and Italy had hitherto been unsuccessful . . . . Unity of direction which France had early asked for and which had been so conspicuously lacking was forced upon the allies by the economic policy of the United States. . . .

. . . . However just about the time that inter-Allied cooperation in the economic war really became effective the blockade ceased to occupy the first place in the economic anxieties of the Allies. The German counter-blockade . . . , [their] achieved unity of action . . . in respect of maritime transport, . . . [gave] them victory in the economic war.<sup>46</sup>

In the period 1914-17, and prior to the United States' entry into World War I, the Allied long distance blockade was in an evolving process. During that period it was the subject of diplomatic protests by the United States and other neutral countries such as the Netherlands, Denmark, Norway and Sweden. This latter group, consisting of minor powers having Germany as their neighbor, provided an economic protective arc around northern Germany. Their economic significance for Germany was greatly enhanced, as has already been noted, by the implications of the Declaration of London of 1909,<sup>47</sup> had the Entente Powers accepted the 1914 United States proposal to that effect.<sup>48</sup> While they supported the United States' position down to April 2, 1917, the Dutch and Scandinavian neutrals negotiated with the Allies prior to that date to ameliorate the impact of the blockade upon them in consideration for their limiting their exports to Germany.

In reviewing the relations between the United States and the Entente Powers retrospectively from April 2, 1917, and comparing them, prospectively, with the United States' attitude after the German Emperor's second order of unrestricted submarine warfare on January 19, 1917, it must be said that the United States had a complete change of heart regarding the matter of the Entente's policy of imposing the long-distance blockade. Just prior to April 2, 1917, the United States' attitude toward Germany had been exacerbated by the German proposal to Mexico and Japan that they enter into an alliance against the United States (published on March 1, 1917).<sup>49</sup> With regard to the United States' wholehearted and energetic participation in the Allies' blockade of Germany and its reflecting a complete change of heart, Guichard wrote, regarding earlier American attitudes, "it is of course quite

true that in August 1914 the United States had exchanged some very tart notes with the Allies on the subject of economic war. . . ."<sup>50</sup>

After April 2, 1917, under the added pressure from the United States, the neutral states' adhesion to the Entente's economic policies became a matter of increased necessity. In addition, as a result of her economic pressures and deprivations, and of her sense of triumph as a result of her imposition of the Treaty of Brest-Litovsk on a prostrate Communist Russia,<sup>51</sup> Germany increased her demands, especially on the Netherlands. This had the result of European neutrals becoming more accommodating to the Allied and Associated Powers. Indeed, the famous affair of the "Dutch Convoy" in April-June 1918 clearly illustrated the Netherlands' acceptance of the Allied long distance blockade of Germany then in force.<sup>52</sup> The fact of the United States' participation in the long-distance blockade was all-important to the Netherlands' position. Without it her capacity to resist German demands would have been nil.

### *C. World War II, 1939-45*

By contrast with the neutral protests, prior to April 2, 1917, against the Entente Powers' long distance blockade in World War I, the United States did not take a similarly adversarial position with respect to the Allied Powers' blockade of Germany in World War II. On the other hand, both the United States and the Soviet Union reserved their rights to claim compensation for possible future losses due to the Allied Powers' enforcement of their blockade.

Such possible claims for compensation do not necessarily indicate compensation for denials of the other party's rights, but only that the Allies should pay for injuries to persons or property incidentally inflicted in the exercise of their blockade rights. After some three months into World War II, Great Britain and France reinstated what were, in effect, the principles of their long-distance blockade of World War I. Thus, after waiting for approximately three months, Great Britain promulgated her Order-in-Council of November 27, 1939.<sup>53</sup> Other neutrals, for example, Italy, protested.<sup>54</sup> After Italy entered the war on June 11, 1940, the system was extended to her.<sup>55</sup> While the Scandinavian countries also lodged protests early in the war, events overcame their positions after Germany invaded and occupied Norway and Denmark and effectively held Sweden in a hammerlock.

Again, as in World War I, Great Britain justified her long distance blockade as a "retaliatory system." Additionally, in World War II, Great Britain felt her position regarding reprisals to be strengthened by the facts of Germany's violation of the London (Submarine) Protocol of 1936, her breach of Hague Convention VIII on minelaying, and her indiscriminate destruction of seaborne commerce between the Allies and neutral states. After Italy's entry into the War, Great Britain asserted the same right of reprisal against Italy

as against Germany—on the ground of Italy's becoming associated with German methods of warfare.<sup>56</sup> It should be noted that while British and pro-British jurists and commentators were already discussing the idea of a long distance blockade, and were asserting that "Britain could not be expected to fight another war without resort to"<sup>57</sup> that form of economic warfare, the United Kingdom did not rely on any notion that such a system had emerged as a separate category in the customary international law of war. Instead, she merely had recourse, once more, to her "retaliatory system." Her caution in this regard was, of course, largely due to her uncertainty about the attitudes of the United States and the Soviet Union and her policy of not encouraging those countries to challenge her system in the name of the freedom of the high seas. This delicacy was further motivated by the sobering realization of the strength of isolationism in the United States and the violent reversal of Soviet foreign policy to a much more pro-German stance, as evidenced by the fall of Litvinoff and the Molotov-Ribbentrop Non-Aggression Pact of August 1939, the Soviet partition of Poland with Germany, and the Soviet seizure of the Baltic States, as an outcome of Joseph Stalin's new pro-German orientation.

In comparing the diplomatic protests served against the Entente Powers regarding their long range blockades in World War I with those issued in World War II, there would appear to be, quantitatively and qualitatively, a considerable decline, on the part of the neutral states, in their resorting to this form of resisting or rejecting the Allies' retaliatory system. This raises the question of whether decreased reliance on strong diplomatic protests in World War II as compared to World War I, may arguably be seen as the beginning of an acknowledgment, albeit reluctant, of their decreasing utility and necessity. But, again in World War II, as in World War I, the factors leading to the emergence of a customary international law norm justifying the long-distance blockades were camouflaged by both sides' invocations of reprisal as justification for their actions.

#### *D. Review of Developments Through World Wars I and II, and the Interwar Period*

To whatever extent decisions of international tribunals, or of domestic tribunals applying international law, have credibility, the decisional law has thrown an ambiguous light on the issue of the acceptance of such zones.

First, it should be noted that the United Nations War Crimes Commission did not address the question of blockade by resort to aerial attacks on shipping. Aircraft, clearly, have limitations similar to those of submarines regarding any capability to visit, search, and seize ships. Possibly this omission could be explained by the fact that the Allied forces engaged in this activity to a greater extent than did the Axis Powers, largely due to their very much greater preponderance in the air.<sup>58</sup>

But the question must be asked whether the fact of non-prosecution at Nuremberg for the indiscriminate sinking of merchant ships by aircraft was due simply to the fact that the United Nations had themselves engaged in this activity in World War II, knowing it to be illegal, and the United Nations prosecutors did not wish to have the conduct of their own military planners stigmatized as war crimes? Or, alternatively, did they so plan their cases because they had felt that long distance blockades had become lawful through general practice and acceptance and, further, because such blockades could lawfully be enforced by aircraft notwithstanding its limitations with regard to ensuring the safety of target ships' papers, passengers, and crews?

The records of the Nuremberg proceedings regarding prosecution for the indiscriminate sinking of merchant ships by submarines to enforce maritime prohibited zones as war crimes are instructive. Although Admiral Doenitz was charged before the International Military Tribunal at Nuremberg with waging unrestricted submarine warfare contrary to the London Naval Treaty of 1930<sup>59</sup> and the 1936 Naval Protocol<sup>60</sup> (to which Germany had acceded), and although evidence was shown that, on September 3, 1939, the German U-boat arm began unrestricted submarine warfare, the Tribunal was not prepared to hold Doenitz guilty for his conduct of that form of submarine warfare against British armed merchant ships. In addition, after receiving evidence of British unrestricted submarine warfare in a maritime prohibited zone which the United Kingdom had established, namely the Skagerrak, following a British Admiralty announcement of May 8, 1940, and after noting Admiral Nimitz's answers to interrogatories which showed that the United States Navy had begun unrestricted submarine warfare against the Japanese in the Pacific Ocean immediately following the surprise attack on Pearl Harbor on December 7, 1941, the Tribunal announced that its sentence of Doenitz was not assessed on the ground of his "breaches of the international law of submarine warfare."<sup>61</sup> Thus the British diplomatic campaign, during the inter-War period, to outlaw the type of submarine warfare<sup>62</sup> to which the German Empire resorted in World War I, was not revived after World War II. It should be noted that while the British exclusionary zone in World War II was comparatively modest, being constituted by an arm of the North Sea, the Skagerrak,<sup>63</sup> the United States had declared the whole of the Pacific Ocean (one third of the Earth's surface) a prohibited zone in which Japanese ships, both naval and mercantile, would be sunk without warning.

Finally, it should also be noted that some aggravated types of submarine attacks on civilian shipping in both World Wars were punished as war crimes. But these always involved conduct that was more reprehensible than merely that act of sinking the victim ship without warning. The war crimes cases arising from both World Wars that spring to mind illustrate the types of aggravated circumstances giving rise to the charges. These cases are:

(1) **The Llandoverly Castle** (World War I):<sup>64</sup> Submerged submarine U-boat 82 sank a hospital ship which was distinctly marked as such. The hospital ship was not carrying any military personnel other than sick and wounded soldiers and members of the Canadian Medical Corps. After torpedoing the hospital ship, the submarine's commander, one Patzig, ordered the U-boat to surface and, after questioning some of the survivors, fired on the survivors in lifeboats, massacring many of them. After the War Patzig was not found, but two of his officers were arrested, tried and convicted of their war crimes. The plea of superior orders was rejected because "killing defenceless people in life-boats could be nothing else but a breach of the law;"<sup>65</sup>

(2) **The Peleus** (World War II): The submarine commander ordered the massacre by machine-gun fire of the survivors who were clinging to pieces of wreckage from the sunken merchant ship;<sup>66</sup>

(3) **Trial of Karl-Heinz Moehle** (World War II): As in *The Peleus*, the accused had ordered the massacre of survivors of sunken ships and was convicted for that aggravated offense;<sup>67</sup>

(4) **Trial of Helmuth von Ruchterschell** (World War II):<sup>68</sup> The accused was the commander of an armed German surface raider. He was charged with committing, *inter alia*, the following offenses against Allied merchant ships: (a) continuing to fire after the target ship had signalled her surrender; (b) failure to make provision for the safety of survivors (despite having the facilities for taking prisoners on board his ship); and (c) firing at survivors in life rafts.<sup>69</sup>

### ***E. The Falklands (Malvinas) Conflict, 1982***

In each of two conflicts fought in the present decade, namely the Falkland Islands Conflict (1982)<sup>70</sup> and the Persian Gulf Tanker War (1982-1988),<sup>71</sup> both sides promulgated Maritime Exclusion Zones. But their various definitions and uses have been very different. In the 1982 Falkland Islands Conflict a number of exclusion zones (seven in all) were proclaimed. The British declarations and the first two Argentinian zones reflected the desire of both sides to limit the conflict to the combat forces that they had committed to the struggle, to the Islands, and to the seas around them. The British resort to maritime exclusion zones was to further their persisting combat strategy of retaking and defending the Islands. Their persisting strategy was, in part, executed by raiding combat tactics. On the other hand, the Argentinian invocation of such zones (except her third, her May 11, 1982, proclamation of a "South Atlantic War Zone")<sup>72</sup> was for the purpose of reinforcing her persisting tactics once her raiding strategy had netted her control over the Falkland Islands. This appeared to be a corollary of the claim that each of the parties asserted, namely that it was merely exercising its right of self-defense, and was limiting its use of force to expelling its adversary from the



Islands, or to preventing that adversary from permanently establishing its territorial sovereignty over them.

The first British announcement of a maritime exclusion zone (MEZ), took effect on April 12, 1982. It established the prohibited area as being two hundred nautical miles radius from a point approximately at the center of the Falkland Islands. Under this promulgation only Argentine warships and naval auxiliaries found within this zone were liable to be attacked.<sup>73</sup> On the following day Argentina responded by establishing a two hundred sea-mile zone off its coast and around the "Malvinas" (Falkland) Islands. Since the British fleet was still some distance from the Islands, the effectiveness, for the first week or so, of the declaration of the British Maritime Exclusion Zone had the effect, as a ruse of war, of reinforcing an unfounded Argentine belief that the Royal Naval nuclear submarine *H.M.S. Superb* was on station in the area of Puerto Belgrano and the Falklands. The fact that *Superb* was at Holy Loch, Scotland, at the time may give rise to the question whether the British "blockade" complied with the Declaration of Paris.<sup>74</sup> On this point Professor Levie has commented:

The British declaration was not really a blockade, as merchant ships and neutral vessels were not barred from the exclusion zone; it only applied to enemy naval vessels. It was, therefore, nothing more than a gratuitous warning to Argentine naval forces.<sup>75</sup>

On April 23, 1982, the United Kingdom Government informed the Argentine Government that:

Any approach on the part of Argentine warships, including submarines, naval auxiliaries or military aircraft, which could amount to a threat to interfere with the mission of the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft, including civil aircraft engaged in surveillance of these British forces, will be regarded as hostile and are liable to be dealt with accordingly.<sup>76</sup>

The zone enunciated in this second declaration has been referred to as "The Defensive Bubble." The Royal Navy, the British public and, indeed, the world, did not have long to wait to see this proclaimed "Defensive Bubble" put into lethal effect. On May 2, 1982, the British submarine *Conqueror* torpedoed and sank the Argentine cruiser *General Belgrano* some thirty miles outside the MEZ around the Falkland Islands. As a result, the British Government experienced some criticism in Parliament and in both the domestic and foreign press. In Parliament the responsible Minister (Mr. Nott) responded by pointing out that:

That zone [that is, the MEZ proclaimed on April 12, 1982] is not relevant in this case. The "General Belgrano" was attacked under the terms of our warning to the Argentines some 10 days previously that any Argentine naval vessel or military aircraft which could amount to a threat to interfere with the mission of British forces in the South Atlantic would encounter the appropriate response.<sup>77</sup>

On April 28, 1982 the British Government announced its Total Exclusion Zone (TEZ),<sup>78</sup> to take effect on April 30, 1982. While occupying the same area as the MEZ of April 12, this zone also encompassed "any . . . aircraft, whether military or civil which is operating in support of the illegal occupation" of the Falkland Islands.<sup>79</sup> It continued with the further warning that:

Any ship and any aircraft, whether military or civil, which is found within this zone without due authority from the Ministry of Defence in London will be regarded as operating in support of the illegal occupation and will therefore be regarded as hostile. . . .<sup>80</sup>

Finally, it should be noted that in all her announcements of the delimitations of her specific zones Great Britain still continued to insist that they were without prejudice to her general right of self-defense under Article 51 of the United Nations Charter. This provided a further legal justification for the sinking of the *General Belgrano*. Criticism of that attack may be further seen as paradoxical considering that, at the time of the sinking, the Argentinian forces were occupying the Islands and the British forces were forcibly attempting to terminate that possession.

The United Kingdom's Ministry of Defense announced an important policy statement on May 7, 1982, when it said that, because hostile forces "can cover, undetected, particularly at night and in bad weather,"<sup>81</sup> the distances involved in resupplying the Argentine forces on the Falkland Islands, or take other hostile action, "any Argentine warship or military aircraft which are found more than 12 miles from the Argentine coast will be regarded as hostile."<sup>82</sup> The Soviet Union, without protesting the creation of an exclusion zone in principle, advised the British government that it considered the latest statement of policy unlawful, "because it 'arbitrarily proclaim[ed] vast expanses of high seas closed to ships and craft of other countries.'"<sup>83</sup> On this Professor Levie has commented:

Of course, a blockade always denies the use of part of the high seas to other countries. While the Soviet Union might have questioned the extent of the blockaded area as excessive, if the blockade was effective (and there seems little doubt that it was), it was a valid blockade under the 1856 Declaration of Paris, to which Russia was one of the original parties.<sup>84</sup>

On the other hand, if the Soviet criticism is directed against the proclamation on the basis of its ineffectiveness due to an insufficient ratio of force to space, a point not answered in Professor Levie's comment, it would appear to be factually inaccurate. Adequate force appeared to be present wherever needed to carry out the enforcement of the British maritime exclusion zones for effectuating that country's logistical strategy. Furthermore, the area was not so vast as to be unmanageable in fact, and

the proclamation appeared to have been enforced by persisting holding, rather than raiding, tactics.

After the Argentine forces on the Falkland Islands had surrendered, Great Britain lifted the Total Exclusion Zone (July 22, 1982), but, at the same time, asked the Argentine Government (*via* the Swiss Government) not to allow its military aircraft or warships within a zone measuring 150 sea miles radius around the Falkland Islands. Similarly Argentina was warned not to allow her civil aircraft and shipping within that zone without the prior agreement of the British Government.

In response to the British MEZ on April 8, 1982, Argentina proclaimed a similar Maritime Zone, and, on April 29, 1982, it strengthened its MEZ. Finally it proclaimed, on May 11, 1982, a "South Atlantic War Zone." This last declaration has been the occasion of well-known litigation. In *Amerada Hess Shipping Corp. v. Argentine Republic*<sup>85</sup> the plaintiff corporation sued Argentina for the loss of its very large oil tanker *Hercules* as a result of three successive air strikes by Argentine aircraft using bombs and air-to-surface missiles. At the time of the attack the *Hercules* was "about 600 miles off the Argentine coast and nearly 500 miles from the Falkland Islands."<sup>86</sup> The court added that she was "in international waters, well outside the "exclusion zones" declared by the warring parties."<sup>87</sup>

While that statement would have been true if it had referred to the British zones and those declared by Argentina on April 8 and April 29, 1982, it was of doubtful accuracy with regard to Argentina's "South Atlantic War Zone" which that country declared on May 11, 1982. It is a valid inference, therefore, that the court may have been prepared to recognize Argentina's first two declarations as creating valid exclusion zones, but it was not prepared to extend that recognition to the vaguely defined "South Atlantic War Zone."<sup>88</sup> Indeed, this last zone, regardless of the bombing of the *Hercules*, fails the tests of reasonableness, proportionality, clarity of definition, and self-defense. It merely proclaimed the basis for a random, raiding logistical strategy. It clearly failed to provide for an adequate ratio of power to space and time, and amounted to little more than an excuse for conducting indiscriminate attacks on neutral shipping, rather than formulating an effective logistical, persisting, holding strategy which could be integrated in a sea-keeping assertion of naval power utilized for rational ends.

#### ***F. The Persian Gulf "Tanker War" 1980-1988***

Although the Iraq-Iran war began with the border clashes in June-August 1980, leading to full-scale land fighting on September 21, 1980,<sup>89</sup> the Persian Gulf Tanker War, as a specific logistical strategy in an array of means and methods for conducting hostilities in the Gulf, may be said to have begun with the Iraqi declaration on August 12, 1982, of a prohibited war zone

at the northern end of the Persian Gulf (north of 29° 03' North).<sup>90</sup> In contrast with the Falklands (Malvinas) Conflict, which took place in an unfrequented and secluded part of the world, the Persian (or Arabian) Gulf is one of the world's busiest waterways. The original (August 12, 1982) Iraqi prohibited war zone contained the northern end of the Gulf. In reality, however, this zone was not so much one of exclusion, supported by a persisting logistical strategy, as the proclamation of an intention to engage, as opportunities offered, in random air raids to inhibit Iranian shipping in the Gulf. Subsequently, the zone's area was enlarged so as to include the key Iranian oil installations on Kharg Island. In February 1984, this was expanded to include a 50-mile radius around Kharg. Until early in 1984 the Iraqis concentrated their attacks on ships navigating in the northern zone and sailing to and from Bandar Khomeini and Bandar Manshar. But after early 1984 they concentrated their air strikes on ships sailing to and from Kharg.

The Iraqi logistical strategy was clear. Like Napoleon's Berlin and Milan Decrees against Great Britain (which were directed against British trade and that country's ability to wage war and subsidize her allies from her income from that trade), the object of the raids was to deny Iran the income she needed from oil exports in order to purchase war materiel abroad and, generally, defray her costs of waging the war.

Iran had a similar logistical end in view, namely that of suppressing her enemy's trade with third countries which enabled Iraq to earn the money needed in order to defray her cost of waging the war. This prevention of trade was executed by means of interdicting all and any navigation to and from Iraqi ports in the Gulf. But Iraq was able to export her oil, and so defray the costs of her belligerency, by pipelines across her western and southern neighbors. In addition, Iran also established prohibited zones off the shores of Iraq's backers in the war, for example, Kuwait and the United Arab Emirates, in the hope of reducing their oil revenues and hence their contributions to Iraq's war effort through limiting her purchasing power on the world arms markets.

Responses to Iranian attacks launched in support of this policy included the United States policy of reflagging Kuwaiti tankers, establishing convoys with United States, British, French, and Italian escorts, and bringing the issue of the unlawful interference with neutral flag shipping to the attention of the Security Council of the United Nations. All these steps did not prevent continued Iranian raids on neutral flag tankers. Nor, indeed, did the Saudi Arabian proclamation of a 12-mile safety corridor which, since it was within the territorial seas of the seven states of the Gulf Cooperation Council, was entitled to belligerent respect, and was intended to provide security for neutral shipping—especially the very large tankers carrying

oil from Kuwait and from other supporters of Iraq. But this raised no legal issues regarding its validity as a maritime zone, since it merely created a right-of-way for neutral ships in neutral states' territorial waters.

The legal issues involving the Iraqi and Iranian exclusion zones, and the attacks on shipping therein, depended very largely on the reasons for those promulgations. Clearly they were not promulgated, as were the Japanese proclamations of 1904 and those of the United States of 1917, for purposes of self-defense, nor for the furtherance of persisting or holding strategies. They were announced for purposes of inhibiting shipping in the Gulf from engaging in the oil export trade of each belligerent's adversaries and their supporters by means of random attacks. They reflected offensive raiding strategies having only adventitious impacts on possible target shipping.

Similar to the experience in World Wars I and II, especially early in World War I when neutral shipping was attacked, the neutral states protested and denounced the attackers. In contrast to those earlier conflicts however, it should be noted that both Iran and Iraq made neutral ships their main targets. Furthermore, Iran not only attacked neutral shipping which may have been suspected of earning revenues, either directly or indirectly, for Iraq, but also neutral ships when they were navigating between neutral ports or even fishing in the Gulf. This, indeed, places the Iranian policy well beyond what may possibly be seen as defensible by supporters of an emerging customary international law permitting the establishment of effective exclusionary zones maintained persistently by an adequate ratio of power to space and time. Even when satisfying these criteria, such a zone may be lawful only if it is, comparatively speaking, maintained effectively and complies with the rule of reasonableness. It may not provide an excuse for a raiding strategy directed randomly against any or all non-Iranian shipping found in the Zone without regard to their nationality or to their purpose for being in the Zone.

There is a further consideration: Although the belligerents have not been subjected to the severe and hostile criticism that may have been expected, or that was the experience of the belligerents in World War I, the neutral states' muted outrage may not be due to their tacit acceptance of a new customary rule exposing them to random, raiding attacks. Rather, their relative silence may be attributed to the fact that the very large tanker surplus fleet (and threat of an oil surplus as well) and the favorable conditions of insurance in the 1980's rendered such attacks relatively less unacceptable to the tanker fleets' owners than did such attacks during the World Wars, when they resulted in a great scarcity both of shipping and of the cargoes those sunken ships had carried.

### III. Review of Some Relevant Concepts Relating to the Emergence of Customary Principles of International Law Governing the Establishment of Maritime Exclusion Zones in the Context of the Resort to the Use of Force

#### *A. Custom and the Emergence of Belligerent Maritime Usages and Obligatory Rules*

Customary international law is formed from a combination of "a constant and uniform usage practised by the States in question"<sup>91</sup> and the essential psychological element of *opinio juris sive necessitatis*.<sup>92</sup> Because, for so long maritime states have stressed, as fundamental to their survival, the freedom of the high seas, belligerents' claims to enforce maritime exclusion zones must be carefully balanced against the traditional and basal doctrine and the interests interpreting it. Assertions that the power to create such zones has emerged into customary international law demand rigorous criteria for justifying their promulgation by warring states. Indeed, a case-by-case approach is required. On the other hand, it should be observed that the creation of such zones has arisen, in part, from the development and deployment of new weapons, from the evolution of new tactics, and from the emergence of economic warfare as an important, indeed essential, weapon. Thus, they have been resorted to for the purposes of both combat and logistical strategies.

The dual essentials of usage and the actor's belief in the right or necessity of acting in the prescribed manner hold equal sway as criteria for determining the emergence of a customary law doctrine or privilege.<sup>93</sup> Furthermore, when these are consistent with the fundamental right of self-defense, and satisfy the rule of reasonableness, their potential interference with a neutral state's traditional rights under the freedom of the high seas may be justified. On the other hand, if they are implemented by raiding strategies, even if for the purpose of self-defense and even if they may satisfy the criteria of proportionality and the rule of reasonableness, they may not, *ceteris paribus*, be justifiable. Customary international law cannot recognize a belligerent right which is ineffective and which permits an actor to fail to lay an even hand on those regarding whom it has the right or privilege of imposing its regime. Thus a maritime exclusion zone which is only enforced sporadically or randomly merely by raiding tactics should not be seen as entitled to recognition as lawful under customary international law.

The practice of declaring maritime war zones or exclusion zones arose, as Professor Stone has pointed out, from the necessities of the situation confronting, not only the United Kingdom, as Stone argues, but Germany as well. The reliance by both sides on invoking belligerent reprisals

camouflaged the “long term transformation of the traditional laws of blockade.”<sup>94</sup> The question, however, remains, what values apply to legitimate that transformation and what values will reject either or both claims to validity? It is, furthermore, a thesis of this paper, that these two disparate types of war zones are not utilized symmetrically. Indeed, while the former is based on an effective persisting holding logistical strategy the latter is based on a raiding logistical strategy. In contrast with positions such as those taken by Stone or Fenrick, this paper views these unlike devices in aid of strategy as not being entitled to be treated as alike juridically. Indiscriminate sinkings of merchant ships by the U-boat arm as the main means of pursuing a raiding logistical strategy cannot claim to fit under justifications which may uphold the legality of the persisting logistical strategies reflected in the Long Distance Blockades by, respectively, the Entente Powers (in World War I) and the United Nations (in World War II). The two modes of waging economic war and the strategies by which they were pursued were so different that it would be absurd to invoke arguments and evidences justifying the latter to validate the former.

Necessity is also reflected in the changed circumstances of modern economic warfare. Technological change, in the form of the ever-increasing destructiveness of modern weaponry, has created new challenges for the international law of armed conflict. Furthermore, the strategic challenges presented by the contemporary development of advanced nations’ economic infrastructures have called for new responses in terms of economic warfare which, in turn, have created new challenges for the international humanitarian law relevant to their deployment and use. When the rules of blockade were first evolved, most European states relied quite heavily on the coastal maritime transportation of their goods, even for domestic and internal trade. At that time contraband and blockade control was relatively simple because goods would pass from port to port by sea and their destination would be revealed by their movement even if transshipments were involved. Today most states, even such states as Iraq and Argentina, have extensive waterways and railways for internal and international transportation. By rail Iran can be supplied from the Soviet Union and by highways from China and Pakistan. Writing of such an expansion of states’ economic infrastructure as this factor existed back in the time of World War II, Julius Stone wrote:

The expansion of alternative rail and inland waterway transport facilities, with which Germany was superlatively endowed, transformed this situation. “The conditions of modern commerce offer almost infinite opportunities for concealing the real nature of a transaction, and every device which the ingenuity of the persons concerned or their lawyers could suggest has been employed to give shipments intended for Germany the appearance of genuine transactions with a neutral country.”<sup>95</sup>

#### ***B. “Necessity” in the Formation of Customary International Law***

While some writers<sup>96</sup> tend to denigrate the role of “historical” or “social”

"necessity" as a possible alternative, or additional, element of *opinio juris*, the argument here is that changes in the technological and social infrastructure of a social relationship operate to bring about legal change, not so much under the rubric of *opinio juris*, as under that of its disjunctive<sup>97</sup> clause *sive necessitatis*. This disjunctive meaning would appear to be inherent (but to most writers latently so) in the traditional Latin formulation.

The second step, in reviewing the relevance of the criteria for determining the incremental effect on legal change of the technological and socio-economic substratum, is to observe that an emerging custom may tend to displace existing rights assured under international law. For example, the continental shelf doctrine was criticized, in its early years, as potentially displacing the traditional, and entrenched, freedom of the high seas—for example, the traditional rights of trawling, dredging and anchoring anywhere beyond states' territorial seas. Thus, Professor Humphrey Waldock, later President of the International Court of Justice, observed, on April 5, 1950, that: "[t]he suggested new doctrine of the continental shelf is not merely novel but involves a reversal of existing customary [international] law."<sup>98</sup> But this consideration did not prevent Waldock from arguing in favor of recognizing that now popularly accepted, but then emerging, doctrine as customary international law.

Even more significantly, and regardless of the strategies involved (i.e., persisting and hence "effective", or raiding, and hence, random and thus proportionately ineffective), the recognition of states' claims to establish Maritime Exclusionary Zones as lawful will always necessarily be effectuated at the expense of freedom of the high seas for all navigation including, to the extent necessity may limit them, the rights of neutral traders. In this regard, of course, belligerent maritime war zones, or exclusionary zones, which are usually intended to last the duration of the conflict, are to be distinguished from the usually more transient, maritime exclusion zones that states establish for bombing and gunnery exercises in times of peace. They (i.e., belligerent maritime exclusion zones) are also to be distinguished from those maritime zones which states announce for the testing of nuclear devices and weapons. These, with perhaps one exception, that of France<sup>99</sup> in recent years, have been predicated, not on an enclosure of an area of the oceans, but on the principle of a "Warning to Mariners." This device simply notifies aircraft and ships proposing to use the area of the dangers to them attending the notifying state's exercise of its own freedom of the high seas. It should be stressed, in this context, that such warnings may be brief, or may remain in place for indefinite periods of time.<sup>100</sup> Clearly, the task of establishing the emergence of a customary rule permitting belligerent states to impair, if not eliminate, the rights of neutrals to enjoy the freedom of the high seas is far more burdensome than defending the privilege of states, in the pursuit of their national security interests, to create temporary dangers for shipping in limited



sea areas, by testing weapons on the high seas or engaging in bombing and gunnery practice and by issuing warnings to others of the presence of those dangers.

***C. The Legal Significance of Diplomatic Protest as an Inhibiting Factor in the Formation of a Customary Norm***

Diplomatic protest has been seen as an inhibitor of custom, and writers have suggested that its absence can be strong evidence of acquiescence to a change in customary international law and, hence, to the emergence of a new norm supplanting and negating the old.<sup>101</sup> But, as D'Amato points out, states "do not issue notes of protest to the actions of other states that they regard as illegal under international law," and argues that "[f]oreign offices which did so would have little time for anything else."<sup>102</sup> He also maintains the interesting thesis that reliance on this procedure as a factor in the making or the restraining of the formation of customary international law is too narrow and more restrictive than necessary for the recognition and validation of new rules. He points out, on the contrary, that the sources and the flow of decisions in the process of forming a new customary norm of international law is much more flexible and pluralistic. He states, and this writer agrees fully with his argument, that:

This diplomacy is usually conducted verbally by ambassadors, representatives, consuls, visiting businessmen, and so forth. The range of negotiating tactics is quite vast, including threats to corporate assets of the other country's nationals that are located in the complaining state, retaliation by raising tariff barriers, reduce foreign economic or military aid to the target state or its allies or dependents, support another country's hostility to the target state, vote against the target state in the United Nations, and related threats or warnings.<sup>103</sup>

The fact that the United States, the major protesting state against the creation of prohibited zones (or war zones) in both World Wars, embraced the policy of creating them after becoming a participant in both, tends greatly to undermine the significance of both sets of her protests. In any event, and, in addition, following the principle that "actions speak louder than words,"<sup>104</sup> the United States' affirmative policy regarding maritime exclusion (war) zones after she became a belligerent should carry more weight than her previously published protests as a neutral. It should be noted, too, that in World War II, while neutrals such as the Netherlands and Norway regarded the British resort to maritime exclusion zones as contrary to international law down to May 1940, thereafter these two countries, through their governments-in-exile, supported such zones, as did the United States after its entry into World War II. In light of the subsequent conduct of the states that engaged most vociferously in voicing their diplomatic protests against the declaration of maritime exclusion zones, the conclusion may be drawn that the diplomatic protests lodged against the declaration and enforcement

of exclusion zones established by the Entente Powers in World War I as well as the United Nations in World War II are of dubious efficacy and carry little or no weight in restraining the emergence of a customary international law norm legitimizing maritime exclusion zones. This is the case despite the fact that these regimes in their various forms, encroach upon the doctrine of freedom of the high seas and despite their effect of curtailing the traditional rights and immunities of neutrals.

With regard to the diplomatic reaction to the British Total Exclusionary Zone of April 30, 1982, the Soviet Union, as has been noted,<sup>105</sup> took a critical stance. But, because the Soviet Union was the only non-belligerent that complained about the TEZ and, furthermore, because the British did not attack any neutral ships within the zone, it would appear that most interested states acquiesced in it as reasonable. Nor did the Soviet Union have any more than a theoretical basis for its academic comment. That is, she engaged in the relatively unusual, according to Professor D'Amato, act of protesting without being injured and on the basis, merely, of a theoretical disagreement with the British announcement.<sup>106</sup> The Soviet Union had received no injury in fact, and hence the basis for its diplomatic protest may be questionable. Finally, because the Soviet Union's mode of characterizing the zone did not accurately reflect the British policy of ensuring safeguards for neutrals,<sup>107</sup> the Soviets' protest cannot be regarded as having significantly effective validity in restraining the emergence of customary international law norms on the subject.

#### IV. Customary Law and the Usages of War: the Substratum of Modification and The Relevance of Military Utility

##### *A. Relativism, Military Economy<sup>108</sup> and the Role of Law*

The Romans may have believed the maxim *inter arma silent leges*, but today, unless a contest becomes "absolute"<sup>109</sup> in the Clausewitzian sense or "total" in the nuclear holocaust sense, there are, necessarily, areas of common interest where the principles of humanity, reciprocity and utility have important functions. In addition, as has already been observed, the value of military economy,<sup>110</sup> which provides the sound basis for planning any campaign, gives rise to a second development, namely the mutual respect of common restraints as a matter of common interest. In his defense of the utility of international law, Sir Hersch Lauterpacht pointed out:

At the same time, in view of the humanitarian character of a substantial part of the rules of war it is imperative that *during the war* these rules should be mutually observed regardless of the legality of the war. For it is these rules which, on the whole, have been generally observed in the past—for the reason perhaps that they do not seriously interfere with the achievement of the major purpose of the war.<sup>111</sup>

Indeed, building upon Lauterpacht's thesis, it is possible to say that in all wars, except those that Clausewitz identified as "absolute" (and considered, in the pre-nuclear age in which he lived, to be impossible to wage<sup>112</sup>), the interest of both or all belligerents is that rules which temper the ferocity of waging war, and especially those that confer a benefit in terms of military economy, should be observed. This prudential economy of force is not so much a matter of a warrior's self-image as being *sans peur et sans reproche*, as of military utility and each belligerent's self-interest in expending the minimum of force for achieving the object of the contest and of maintaining a reserve of force to meet further contingencies.<sup>113</sup> Furthermore, Clausewitz accepted the fact that the inherent "frictions,"<sup>114</sup> "checks," and "modifications" inherent in "the apparatus of War," and "the non-conducting medium which hinders the complete discharge"<sup>115</sup> of belligerent powers (energy), acted as restraints on focusing the complete direction of energy, without any diffusion, onto the object of the war itself. In addition, in our own day, we have come to call, not for the "utmost use of force,"<sup>116</sup> but "limited" applications of force in the sense that the whole power of the state is not concentrated into an all-consuming effort of will to which all other considerations are subordinated. For it is highly probable (or well-nigh inevitable) that the more intense becomes the focus of the will to win the greater will be the temptations to flout relevant rules of international law, especially if these are perceived as restraints on the will to victory. While soldiers and statesmen are mistaken in perceiving the rules of international law as adding to Clausewitz's "non-conducting medium" acting as a restraint on the complete direction of energy, the possibility of their doing so may render the atmosphere of all-out effort inimical to the observation of lawful conduct.

### ***B. Limited War: When Militarily Viable and, at the Same Time, Receptive of Humanitarian Law***

Von Clausewitz tells us that political ends may decree that a precise balance should be struck between means and ends.<sup>117</sup> While not resorting to the "utmost use of force," a country waging a limited war must yet master its enemy within the limiting frame of that type of warfare. The commander should act "to a certain extent upon the principle of only applying so much force and aiming at such an object in War as is just sufficient for the attainment of its political object."<sup>118</sup> Experience also illustrates this point. For example, Professor Levie has pointed out that the 1982 Falkland Islands Conflict provided an example in which the fighting was kept within bounds so that the future of the laws of war, having the traditional effect of *temperamenta belli*, remained quite bright, since in that conflict, the localization of the hostilities, which was assisted by the proclamations of six of the seven exclusion zones, kept the war "a gentlemen's war".<sup>119</sup> A geographically more diffuse conduct of the hostilities would have led to much more violent and destructive operations, indeed to those

political frenzies which undermine the will to observe the laws of war in an obsessive determination to triumph at all costs.

The thesis presented here is that, first, we should view the intensity of the war in which the issues of legality arise as a possible variable influencing the willingness of each of the combatants to see its own interest in abiding by the rules of war. Thus, for example, as Professor Levie tells us, a limited war at sea may be one in which the rules of war are observed and developed by new conditions. But some wars, for example such wars of national liberation as the Algerian revolt against French colonial rule, were, at least according to some writers, limited wars, yet were redolent with inhumane excesses. Thus a military commander present in Algeria during the uprising there that led eventually to independence, and who had a crucial counter-insurgency role to play, has confirmed that such wars are not, and cannot, of their nature be, "gentlemen's wars," but ones of terrorism, widespread atrocities and genocide. Those crimes were not (in the Algerian context) committed so much on the part of the incumbent government, which usually had to work under the eyes of the press, television news and the public, but rather by the insurgent groups. Thus, that officer (the author Roger Trinquier) wrote:

In the month of September 1958, the forces of order took possession of the files of a military tribunal of one of the regions of the F.L.N. In the canton of Michelet alone, in the arrondissement (district) of Fort-National in Kabylie more than 2,000 inhabitants were condemned to death and executed between November 1, 1954 and April 17, 1957.<sup>120</sup>

In many wars, be they the "total" wars as exemplified by the two World Wars, or certain "local wars" such as, for example, the Iran-Iraq War (1980-1988), or wars in which terroristic insurgencies pit themselves against incumbent regimes, the parties' adherences to the laws of war become subordinated to their all-absorbing, indeed obsessive, struggle for survival. But in between the two extremes of "gentlemen's" limited wars on the one hand, and the self-imposed limitations of an incumbent regime in its fight against terrorism on the other, there do exist, owing to a possibly prevailing political climate between the adversaries, considerations for statesmen who see beyond the conflict itself to the post-war settlements. When such a prudential far-sightedness prevails, wars may be waged in truly limited modes and are subjected by their participants to the governance of the laws and usages of war. Of these the Sino-Japanese War of 1894-95, the Russo-Japanese War of 1904-04 and the 1982 Falklands Conflict provide practical models.

### *C. Emergence of the Maritime Exclusion Zones as Customary Law: A Matter of Contexts*

#### **(1) General Recapitulation**

At the outset of this chapter the presentation was in terms of the emergence of maritime exclusion zones in the context of the famous long distance

blockades of World Wars I and II. These were reviewed in terms of the distinct, but frequently overlapping, criteria of defensive versus offensive objectives and of persisting versus raiding combat or logistical strategies and tactics. The survey of these regimes began with the Japanese defense zones in the Russo-Japanese War of 1904-05 and the United States defense zones which were established in April 1917 on the model of the earlier Japanese zones. While those defense zones may be regarded as having the status of accepted custom, the more controversial long-distance blockading, prohibited maritime zones or logistical strategies may not yet appear to have received unqualified, universal endorsement of legality. But, subject to the test of proportionality and reasonableness, and especially when created for purposes of maintaining a persisting logistical strategy supported by an adequate ratio of force to time and space, they may appear to be moving conditionally into the light of recognition as customary international law. Writing in 1952, Sir Hersch Lauterpacht stated:

[M]easures regularly and uniformly repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade, namely, that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or conveying on neutral vessels such goods as are destined to or originate from him.<sup>121</sup>

In contradistinction from Sir Hersch Lauterpacht's thesis, the argument in this chapter is that, for the evolution of an even-handed, predictable system governing exclusion zones, it is necessary for scholars to be discriminating; otherwise a Panglossian position could evolve which merely states that the commander of the sea may dictate, merely by virtue of his power, what the law allows. Furthermore, the phrase "commander of the sea" is ambiguous. In World War I Great Britain held undisputed command of the surface of the sea. Yet this command did not command Germany's indiscriminate submarine warfare. After the United States entered the war new developments, as well as a far greater concentration of naval forces, narrowly defeated that almost overwhelming threat. Thus, the issue of legality should be tested by more discriminating criteria than upholding the strategies that combatants may view as necessary for their belligerent successes.

Aspects from the considerations already stressed reveal that due regard must always be had for the principles of humanity, proportionality, reciprocity, and utility. Humanitarian law imposes its standards, and they may be most effective when they can be shown to combine with the principle of military economy to moderate the ferocity of fighting's side effects and limit the violence of war's impact upon those drawn into its vortex.

## **(2) Exclusion Zones as Facultative Instruments**

The point has already been made that Admiral Doenitz was not found guilty of the charges which arose from his orders to the German U-boat arm to

engage in unrestricted submarine warfare contrary to the London Navy Treaty of 1930 and the 1936 Naval Protocol. This decision was ambiguously reached, as to principle, after the Tribunal had received evidence of British and United States methods of waging unrestricted submarine warfare, respectively, in the Skagerrak and the Pacific Ocean.<sup>122</sup> A distinction should be drawn, however, between the British maritime exclusion zone (namely of the Skagerrak) and that proclaimed by the United States. This latter zone consisted of the whole Pacific Ocean. The question thus becomes one of reviewing Maritime Exclusion Zones in terms of both the strategies they facilitate and of the values they promote.

(a) *The Exclusion Zone of the Skagerrak*

The Skagerrak is an arm of the North Sea on its eastern side and lies between Denmark and Norway. It is some 150 nautical miles in length and 85 miles in width.<sup>123</sup> By contrast with this relatively restricted area, the Pacific Ocean covers approximately one-third of the Earth's surface. While both declarations may be found to be legally supportable, a basic distinction should be made between the grounds of their respective justifications. The argument vindicating the British proclamation of the Skagerrak as a maritime exclusion zone under emerging customary international law may be accepted, since the strategy for enforcing the exclusion of the adversary from the zone was an apparently successful one. It was a persisting logistical strategy enforced by both aircraft and submarines providing an adequate ratio of force to space. This proposition can be analyzed out into the following elements.

(i) The zone was reasonable in area, and despite German surface naval power, the logistical strategy was persistently maintained and was made effective through submarine and aerial warfare;

(ii) The object, while not primarily one of self-defense, was for the related purposes of:

(a) Hampering the German utilization of Norwegian territory as a base for attacking the British Isles and North Atlantic convoys (including, of course, those going to Murmansk with aid for Russia);

(b) encumbering Germany's reinforcements and supplies destined for its oppressive occupation of Norway—a victim of Nazi aggression;

(c) the target shipping had military objectives and purposes and could not be viewed as carrying supplies which had the object of benefitting the civilian population of Norway; and

(d) the ratio of the area to the force deployed was proportional to the military objective in hand.

(b) *The Pacific Exclusion Zone*

By contrast with the Skagerrak, the Pacific Ocean, the world's largest, has an area of 69,000,000 square miles and stretches from the Arctic Circle to Antarctica.<sup>124</sup> An announcement of indiscriminate sinking by submarines in such a vast area may not, it is suggested, reasonably be regarded as the

enforcement of a maritime exclusion zone, except by a naval service many times larger than the enormous force that the United States Navy deployed there. It is believed, furthermore, that the adjunct of a continuing presence of air power would have been a necessary adjunct for ensuring an effective persisting logistical strategy. For one thing, in so vast an area a submarine fleet of almost any size, on its own, cannot satisfy the requirement of "effectiveness." The sinking of ships thus becomes contingent on the presence, coincidentally, of a target ship and targeting submarine in proximity to one another.

Alternatively, as the case of the United States submarine service's operations in the Pacific illustrated, these coincidences tended to concentrate, before the liberation of the Philippines, in Philippine and Japanese home waters. Accordingly, although the United States Navy identified the whole Pacific as the exclusion zone, in fact the areas of actual attack tended to be where concentrations of Japanese shipping were to be found and where the submarines were ordered. Hence, in the zones of actual combat there was an adequate ratio of force to space and time. But the space so treated was far smaller than the Pacific Ocean.

Of course, strategic and intelligence issues created an advantage in leaving the defined zone as the larger area, since the element of surprise, which provides the submarine with its single most important asset, could be lost if, as the war progressed, different, more limited, and more proportionate exclusion zones were progressively announced as the Allied Forces approached the Japanese home islands. In effect, in the smaller sea areas where submarine tactics were effective, persisting logistical tactics maintained the necessary effective pressure on Japanese shipping; but the raiding strategy on which this mode of warfare was founded, by reason of the extent of the maritime prohibited zone, did not provide effectiveness.

On the other hand, while strategic convenience and utility may call for the announcement of the larger area, the legal rule of reasonableness does not reinforce the strategic consideration, since it is not reasonable to expect an effective enforcement, at all points of the Pacific Ocean, of the prohibition to shipping indicated in the proclamation or enunciation of such a zone. Rather, the U.S. submarines, like the German wolf-packs in the North Atlantic, tended to resemble more the "corsair" type of traditional maritime warfare (with the difference, of course, that the submarines were regular naval units, not privateers) rather than the enforcement of a specific maritime exclusion zone. On the other hand, while such an announcement as that of Admiral Nimitz of the vast maritime exclusion zone, which in itself was tantamount to a hunting license in the conduct of a raiding strategy, may not have found justification under any emerging customary norm—being more an analogy to a policy of worldwide indiscriminate submarine warfare than to the creation of a lawful maritime exclusion zone.

The United States Navy's submarine strategy may, alternatively, be justified as a reprisal against the Japanese methods of waging war, from the surprise attack on Pearl Harbor on December 7, 1941, to that country's inhumane treatment of prisoners of war and of civilian internees caught under their occupation and, hence, not participating, *pro tanto*, in the emergence of a customary norm of international law. In addition, it should be noted, the Japanese, on their part, waged an inhumane and indiscriminate, even if relatively ineffective and militarily inept, submarine warfare on their own part. This mode of warfare on the part of Japan clearly marked, despite its relative ineffectiveness, the reprisals the United States Navy enforced by the submarine arm. Thus, the surprise advantage accorded by the vastness of the Pacific Ocean, which might be seen as negating the reasonableness of the United States declaration under an emerging rule of customary international law, may not be abrogated. It should instead properly be justified under the law of belligerent reprisals rather than as participating in the emergence of a customary norm of international law permitting states, who comply with the necessary criteria, to establish maritime exclusion zones.

Again, the "exclusion zones" created by Iran and Iraq do not seem to have been relevant to those countries' attacks on each other's shipping or to attacks that they made on the shipping of third (neutral) parties. With regard to the Falklands Conflict, in light of the above argument it is believed that the exclusion zones established by both sides, including the "British Bubble," but excluding the last of the Argentine proclamations, namely of the "South Atlantic War Zone" on May 11, 1982, were valid, and testify to the emergence of the relevant customary norm. That last Argentine proclamation was both vague as to area, and random, and hence militarily ineffective, as to enforcement. Accordingly, it should be found to have failed in the test of reasonableness. Indeed, as the United States Court of Appeals for the Second Circuit pointed out in the *Amerada Hess* case<sup>125</sup> the sinking of the *Hercules* was an international wrong. In reaching this conclusion, the court ignored (correctly, it is suggested) any relevance that the Argentinian Declaration of the "South Atlantic War Zone" might have had as a justification, had it not resulted in a randomly chosen raiding action.

While, perhaps, the view already quoted from Professor Lauterpacht, and reiterated by Professor Julius Stone<sup>126</sup> may be overbroadly permissive, the opposing thesis recently expressed by Ross Leckow that "the implementation of war zones can be justified only in very restricted circumstances . . ."<sup>127</sup> and his restricted condonation of resort to this device in terms of "reasonableness"<sup>128</sup> is not supported without a necessary spelling out of the meaning of the word in terms of strategies and goals, and in terms of means and methods relative to those strategies and goals.



## V. Summary Conclusion

At the present time, more than in Clausewitz's day, war has taken on a chameleon-like character. It now depends on politics both as to means and to ends. Thus law necessarily must adjust to the variable social and ideological substrata upon which its pursuit depends in all their protean forms. Accordingly, while the following quotation from the late Professor Julius Stone's magisterial work on the regulation and control of conflict situations is seen as uttering an important insight, it should be treated as an invitation to rethink the emerging rules, and to treat states' conduct in the area, and the consecration of allegedly emerging rules with discriminatory reservation, rather than the indiscriminating proposal of a new norm of customary international law covering most, if not all, of the relevant situations. Stone eloquently and perhaps even cogently wrote:

It is idle to seek to reduce this matter to a *cri de coeur* of humanity. War law, even at its most merciful, is no expression of sheer humanity, save as adjusted to the exigencies of military success, a truth as bitter (but no less true) about attacks on merchant ships, as about target area saturation bombing. And it is also quite idle for Powers whose naval supremacy in surface craft enables them to pursue the aim of annihilating the enemy's seaborne commerce without "sink at sight" warfare, to expect that States which cannot aspire to such supremacy will refrain from seeking to annihilate that commerce by such naval means available to them as submarines, aircraft and mines. To refuse to face this will save neither life nor ship in any future war; and it will also forestall the growth of real rules for the mitigation and suffering under modern conditions.<sup>129</sup>

Stone's observation about practicalities and expectations is without doubt correct. The experience of two World Wars tells that legal change in the direction towards which the late Professor Stone points is becoming crystallized. On the other hand, while the insight and direction of the quotation reflects contemporary needs, it tells us little about testing the distinction between acceptable and unacceptable formulations for declaring maritime exclusion zones and resorting to submarine warfare to enforce them.

The preceding pages have sought to foreshadow and examine discriminating tests for determining whether a maritime prohibited zone is entitled to deference and compliance, as being lawful, or whether it should be resisted by third parties as unlawful. It is now useful to analyze and subsume models of the types of maritime prohibited zones that have been met in history, including very recent history, under the heads that have been developed in terms of goals and strategies. But before that analysis is presented, a general point should be made: while circumstances may dictate whether or not publicity, and the giving of a timely notice, may, or may not, be to the strategic advantage of a belligerent (as for example it was clearly so in the case of the British Falkland Islands proclamation that took effect on April 12, 1982<sup>130</sup>), publicity is clearly a necessary precondition for the legal validity

of every exclusion zone. In this context, Fenrick has correctly argued that the declaring state should:

[P]ublicly declare the existence, location and duration of the zone, what is excluded from the zone, and the sanctions likely to be imposed on ships or aircraft entering the zone without permission, and also to provide enough lead time before the zone comes into effect to allow ships to clear the area.<sup>131</sup>

This paper will now summarize and review the arguments that have been developed in terms of ends and means, goals, strategies and methods, and tactics in resorting to maritime prohibited zones as instruments of waging war.

### *A. Defensive Goals and Persisting Logistical Strategies*

First, it is suggested that purely defensive zones of reasonably limited extent, regarding which a timely and public notice to all affected ships and aircraft has been given, for example those established by Japan in the Russo-Japanese War, 1904-05 and by the United States in 1917,<sup>132</sup> have always been acceptable to other maritime powers, even though they did trespass onto the high seas as then delimited. Despite their far greater extent than those of 1904 and 1917, the British and Argentinian exclusion zones (except for that latter country's last proclamation of such a zone which sought to constitute the South Atlantic Ocean as a maritime prohibited zone) in the Falkland Islands Conflict of 1982, were lawful on the same grounds.<sup>133</sup> These may, accordingly, be justified on the basis of the publicity of their announcement, the specificity of their delineation, the fact that adequate time was given for affected shipping to quit the area, and the restraint (and proportionality) exercised in the enforcement.<sup>134</sup> Furthermore, after the arrival of the expeditionary force, the British zones reflected a defensive strategy (although, necessarily, they were part of their proponent's attacking tactics), were logistically persistent and involved an adequate ratio of force to space and time. Hence they also satisfied the traditional, but still prevailing, customary international law rule which requires effectiveness,<sup>135</sup> proportionality, reasonableness and, so far as the United Kingdom was concerned, appropriateness for advancing that country's lawful purpose, namely compliance of both sides with United Nations Security Council Resolution 502.<sup>136</sup>

At this point it may be noted in passing that "Operation Market Time," which was enforced by the United States Navy during the Vietnamese War was legally valid since it was a law-enforcement operation limited to a distance of twelve miles from the low water mark of South Vietnam (it did not extend north beyond the DMZ) and so within the domestic competence of South Vietnam, which legislated to empower the activity. Since that operation was conducted entirely within the territorial sea and contiguous

zone of South Vietnam, it does not come within the perspective of the present paper.<sup>137</sup> Similarly, the blockade of Haiphong and other North Vietnamese ports was justified in the *Naval Commander's Handbook* as being "in conformity with traditional criteria . . .,"<sup>138</sup> and should not be regarded as falling within the emerging concept of maritime prohibited zones, but rather of the traditional notions of blockade.

### ***B. Defensive Goals Expressed in Raiding Logistical Strategies and Tactics***

The establishment of unacceptable and hence invalid maritime defensive zones for the purpose of warning an enemy that shipping could be attacked without further warning, but which cannot be consistently sustained, was exemplified by all three of the Argentinian proclamations. Apart from Security Council Resolution 502,<sup>139</sup> which declared Argentine presence in the Falkland Islands (Malvinas) to be unlawful, the first two Argentine proclamations may be viewed as lawful in terms of *jus in bello* in contradistinction to any reference to arguments in terms of *jus ad bellum*. But that country's third legally indeterminate and ineffective proclamation of May 11, 1982, failed to comply with any criteria of validity.<sup>140</sup> On the other hand, it appeared that none of the three could be sustained by a persisting logistical strategy, so that, on the basis of effectiveness in terms of an adequate ratio of force to space and time, they all become questionable as only being sustained by raiding tactics. These tactics, and the strategy from which they were derived, are no more than the exploitation of the forces' nuisance value. While causing loss of life and supplies, they were too sporadic to affect the adversary's will, or the outcome of the contest. The criticism, in earlier paragraphs, of the United States' establishment of the Pacific Ocean as a maritime zone from which Japanese shipping was purported to be excluded during World War II, reflects the non-validating combination of the criteria of defensive goals expressed through logistical raiding strategies and tactics.

### ***C. Aggressive Goals and Persisting Strategies***

In the Indo-Pakistan War the Indian Navy established an exclusion or blockade zone outside the Pakistani port of Karachi. No specific zone was proclaimed, but any shipping, regardless of flag, was targetted on the high seas. India had a sufficient ratio of power to space to maintain its attacks on neutral shipping both within and without the zone of blockade. That is, while the purpose was aggressive, Indian power was sufficient to maintain a persisting and effective control of the zone affected as well as sea areas beyond it. The reasons that this persisting exercise of power did not become the target of angry repercussions in the rest of the world have been ascribed to the following factors:

- (i) The conflict itself was "short-lived—about a week;"<sup>141</sup>

(ii) Because of the shortness of the time of the blockade, Professor Daniel O'Connell believed that there was little time for reaction. He observed that, "[h]ad the naval blockade been prolonged and strictly enforced, however, the situation might have become very different, especially if the important tanker traffic through the Straits of Hormuz had been incommoded;"<sup>142</sup>

(iii) Most of the shipowners who did suffer loss recovered through their insurance brokers under war risk clauses. In O'Connell's phrase, they "shrugged their shoulders" at the destruction that the Indian Navy inflicted. O'Connell did, however, also mention the case of the sinking of a Spanish ship. This ship's case "was taken up by the Spanish Government, which demanded compensation from the Indian Government."<sup>143</sup> He added: "This was refused."<sup>144</sup>

Although, from the lawyers' point of view, the issues raised by this conflict may have been left in an indeterminate and unresolved condition, their incompleteness provides an important invitation to resolve the facts left dangling in this way under international law. The Indian experience shows how the maintenance of an aggressive, persisting logistical strategy necessarily must be classified as illegal, despite its effectiveness, since the aggressive use of force against neutral shipping not concerned in the war is contrary to the basic principles of international law and the principles and purpose of the United Nations.

#### ***D. Offensive (Aggressive) Goals Supported by a Raiding Strategy***

Although in both World Wars Germany proclaimed prohibited zones in which her submarines would sink merchant shipping, including neutral shipping on sight and without warning, the system was not one of maintaining a prohibited zone as such, but of creating hunting licenses for submarines. The zones were not predicated on the defensive requirements of the German homeland. Thus, they may be contrasted with the actions of Japan in 1904<sup>145</sup> and the United States in 1917<sup>146</sup>. In addition, they were carried out in fulfillment of a raiding strategy which depended on raiding tactics.<sup>147</sup> At no time was there any attempt to hold a sea area by means even of persisting tactics, let alone of an effective and persisting strategy. The idea of establishing and validating a prohibited zone simply by means of a raiding strategy implemented by the surprise excursions of submarines on sink-on-sight hunting missions constitutes a complete contradiction of the notion of maintaining, effectively, a prohibited maritime zone.

While the sea areas proclaimed as prohibited to their adversaries (such as those by Germany in both World Wars and the United States in World War II) may not qualify as lawful maritime exclusion zones they may, possibly, be justified under some alternative rubric. For example, the United States zone might well have been upheld, at the time of its proclamation, as a reprisal

for previous illegal acts or policies by the Japanese naval and military forces. Such zones, however by their very nature, cannot be classified as complying with the requirements of self-defense, proportionality, reasonableness, and effectiveness. Nor can they be seen as providing validating persistent logistical strategies through effective and comprehensive enforcement throughout the zones proclaimed. Hence, they may not be viewed as legitimated by any emerging rule of customary international law dependent on effectiveness and reasonableness.

An argument pointing, possibly, in favor of the validity of the German North Atlantic maritime exclusion zone and the United States zone of the Pacific may be founded on other, narrower, grounds, namely that the ships attacked were part of the enemy's war effort and were naval auxiliaries, not true merchant ships. This would leave as impermissible, however, attacks on neutral shipping. It would, further, lead to characterizing aggravated and unnecessary attacks on survivors in lifeboats, on lifeboats, or clinging to wreckage or other flotation gear as war crimes for which there would be neither excuse nor defense.<sup>148</sup> But this issue relates only to the limits imposed by humanity and necessity on the specific acts which a state or a commander undertakes when implementing a raiding strategy and faces the consequences of his immediate resort to raiding tactics. He runs a high risk of being stigmatized for engaging in the impermissible conduct that his actions may well entail. Such inhumane conduct as that attributed, for example, to Karl-Heinz Moehle,<sup>149</sup> and testified to in *The Peleus Case*<sup>150</sup> remain impermissible under the Nuremburg Principles and decisions.

### ***E. Persisting Moveable Defense Maritime Zones Effectuated by Persisting Tactics***

Reference has already been made to the defense "Bubble" established by the United Kingdom on April 23, 1982.<sup>151</sup> O'Connell has pointed out that prior to that war operational zones consisting of a moveable circle centering on a naval or amphibious task force, "have the benefit of the precedent of the Spanish Civil War".<sup>152</sup> This reference relates to the very interesting and largely forgotten Nyon Arrangements.<sup>153</sup> Such a "moveable war zone" will assuredly have a wide application in the future. When shown to be consistent with such criteria as reasonableness, self-defense, and proportionality between means and ends, these zones are within what may be legally permissible. Professor O'Connell wrote in support of them "that they would not have the characteristics of the war zones condemned at Nuremberg." He warned, however, that "[t]his is not to eliminate legal doubts about the matter, but rather to indicate that the law appears to be sufficiently malleable to give naval staffs a certain freedom of manoeuvre in their planning."<sup>154</sup>

### ***F. Conclusion***

This chapter has sought to relate the question of the possibly emerging

legality, under international law, of certain types of maritime prohibited zones as instruments of war strategy. They have been seen, largely, but not entirely, as involved with logistical strategies, although these zones may also of course, be used to redirect shipping at the belligerent's strategic and tactical battle convenience, provide an early warning defensive system, and limit the area of belligerent activities in any specific contest. It is, of course, true that the goals of the interdiction of supplies to an enemy, the redirection of shipping, the establishment of defensive zones and the limitation of the area of a contest, are all lawful goals. The means and methods, including the strategies and tactics that provide the modalities of achieving these goals, may not necessarily or inevitably be justifiable. Lawfulness will, of course, depend on their specific characteristics and objectives. Also, some goals for which maritime exclusion zones may be deployed, for example, waging an aggressive war or for facilitating an act of aggressive and surprise attack on an unsuspecting victim, or indiscriminately operating against neutral shipping and failing to observe the principle of distinction, are clearly unlawful and are to be avoided by states proposing to establish such zones.

With regard to lawfulness of the means and methods employed in furthering lawful ends, the attempt has been made to review the various strategies and tactics as they tend to be employed to facilitate the belligerent's goals. While some of those may be tainted with the unlawfulness of the ends for which they are used, others are, and should remain, unlawful *per se* on the grounds of their being tainted by their inherent wrongfulness. Their means alone are fatal to their legality. Examples of such tainting elements include their unreasonableness, their want of specificity of definition in space and time (including their failure to allow adequate time for neutral shipping to quit the proclaimed area), their ineffectiveness, and their lack of proportionality to the ends sought. Others may be invalidated by acts of specific inhumanity involved in their enforcement. They are also unlawful if they are simply used as means of giving further effectiveness to raiding strategies.

This paper's purpose in coupling strategies and tactics involved with their goals was to examine the possibility of consecrating some maritime prohibited zones, especially those that scrupulously observe the principle of distinction and respect the rights of neutral shipping and commercial activities, as becoming increasingly acceptable and hence lawful by distinguishing them from those that remain unlawful. This was done in terms of viewing the strategies and the tactics to which the belligerent power resorted for the purpose of implementing the zone as part of its overall maritime war strategy and as part of his obligation to respect the rights, privileges and immunities of third parties. That is, the relevant strategies and tactics employed were examined in terms of determining the lawfulness not only of ends, but also of means and methods. This study has reviewed the interfusion of means and ends, and the manner in which they inseparably color, condition, and

characterize one another. Finally, a basic theme of this paper has been the review of those criteria for appraising the emerging legality of at least those maritime prohibited zones which show effectiveness, persistence, the principle of distinction, respect for neutral rights, humanity, and proportionality.

## Notes

\* Professor of Law (Emeritus), Director, International Legal Studies Program, Syracuse University College of Law. Stockton Chair, Naval War College, 1970-71. This chapter has been written in connection with the ongoing project on "The International Humanitarian Law Applicable to Armed Conflict at Sea" and in part satisfaction of grants for the above project from the Ford Foundation and the United States Institute for Peace. The supplemental support of the Center for Interdisciplinary Studies of the Syracuse University College of Law is also gratefully acknowledged. The opinions, findings and conclusions expressed in this publication are those of the author and do not necessarily reflect the views of the United States Institute for Peace or those of the Ford Foundation.

1. Sir Hersch Lauterpacht has defined maritime exclusion zones (or "war zones") as follows:

[A] war zone in maritime operations may be said to comprise an area of water which a belligerent attempts to control, and within which it denies to foreign shipping generally the same measure of protection which the latter might elsewhere claim.

L. Oppenheim, *International Law: A Treatise*, H. Lauterpacht 7th ed. (London: Longmans Green & Co., 1952), v. 2, p. 681, note 1 [hereinafter cited as Lauterpacht's Oppenheim]. See also, to similar effect, Julius Stone, *Legal Controls of International Conflict* (New York: Rinehart & Co., Inc., 1954), p. 572 [hereinafter cited as Stone, *Legal Controls*]. Under certain circumstances, a maritime exclusion zone reflects a different method of waging war from that of conducting a traditional blockade. Such a zone may have merely the defensive object of keeping shipping, which might otherwise constitute a threat, away from an area, for example, of military operations. On the other hand, such zones may also be used for the purpose of denying an adversary access to resources, economic advantages of many kinds, and war materiel. In both cases, the object of the exclusion is logistical but may reflect a convergence of three distinct concepts: self-defense, blockade, and combat "killing grounds" (this last being a tactical rather than a legal concept). For a discussion of the various strategies involved, see, *infra* note 116 and accompanying text.

2. William Edward Hall, *A Treatise on International Law*, Pearce Higgins 8th ed. (London: Oxford Univ. Press, 1924) [hereinafter cited as Hall]. See also C.J.B. Hurst and F.E. Bray, eds., *Russian and Japanese Prize Cases* (Buffalo, N.Y.: William S. Hein Co., 1972), v. 2, pp. 343-53 [The "Quang Nam"] [hereinafter cited as Hurst and Bray]; T.J. Lawrence, *War and Neutrality in the Far East*, 2d ed. (London: Macmillan and Co., 1904), pp. 83-91. See also, *infra* § II A.

3. See *infra* § II E.

4. U.S. Navy Department, *The Commander's Handbook on the Law of Naval Operations*, NWP 9 (Washington: U.S. Govt. Print. Off., 1987) [hereinafter *Commander's Handbook* or NWP 9].

5. *Id.*, par. 7.7.5.

6. *Id.*

7. *Id.*

8. *Id.*

9. See *infra* notes 30-34, and the reference therein to the Declaration of Paris of 1856 and the Declaration of London of 1909. The text accompanying those notes discusses the treaty requirement of "effectiveness" for the purpose of establishing the validity of a blockade. For the practice of the United States with regard to the effectiveness requirement, and as reflected in the Civil War (or "War of Rebellion") 1861-65, See Dahlgren, *Maritime International Law*, Cowley ed., 1877, *passim*, and especially 25-61. The late Daniel P. O'Connell teaches us that the traditional concept (effectiveness) of the blockade required that it be "visible" and continued with the observation that it "required presence of the blockading force within visual range of the coast, although temporary withdrawal for reasons of stress of weather was not regarded as raising of the blockade." D.P. O'Connell, *The International Law of the Sea*, 2d ed. (Oxford: Clarendon Press, 1984), v. 2, p. 1150 [hereinafter cited as O'Connell, *Law of the Sea*]. Indeed some writers on the traditional concept of blockade, drawing an analogy with besieging a city, argued that the blockading ships should be at anchor. See, e.g., Stone, *Legal Controls*, *supra* note 1, p. 508.

It [*i.e.*, the traditional concept of blockade] presupposed that anchored ships could, with safety to themselves, maintain close physical surveillance of the blockaded ports. It also presupposed that a blockading vessel's sight and reach was limited by the human eye and the telescope and flag signal.

See also *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, p. 779, where the author wrote:

According to one opinion, the definition of an effective blockade pronounced by the First Armed Neutrality of 1780 is valid, and blockade is effective only when the approach to the coast is barred by a chain of men-of-war, anchored on the spot, and so near to one another that the line cannot be passed without obvious danger to the passing vessel. This corresponds to the practice followed before the First World War by France. (footnotes omitted)

It should be noted that this is not the only view. See *ibid.*, pp. 779-80, where we find a further statement regarding the second thesis concerning the requirement that the blockade must be effective: "According to this opinion, there need be no chain of anchored men-of-war to expose to a cross fire any vessels attempting to break the blockade; a real danger of capture suffices. . . ."

10. "Convention Relative to the Laying of Automatic Submarine Contact Mines," October 18, 1907, T.S. 54, Statutes at Large, v. 36, p. 2332, reprinted in *American Journal of International Law (Supp.)*, v. 2, p. 138 (1908). See especially, articles 2 and 3. It should be noted that in *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, p. 781, we find article 2 to be stigmatized as "very unsatisfactory."

11. See quotation from O'Connell, *supra* note 9.

12. For a brief description of "Market Time" and "Sea Dragon," see *infra* text accompanying notes 137 and 138.

13. See Archer Jones, *The Art of War in the Western World* (1987), pp. 57-59 [hereinafter cited as Archer Jones], especially at p. 58, where the author illustrated the term (from the Persian response to Alexander the Great's campaign in Anatolia 334-333 B.C.) as follows:

Instead of assaulting the enemy's (*i.e.*, Alexander's) army to defeat a Greek advance, Mardonius, the shrewd Persian Commander, had used his superb cavalry to raid the Greek army's supply bases to compel a retreat from its strong position at Plataea.

As the rest of this chapter will testify, Professor Archer Jones's analysis and classification of the means and methods of waging war have been seminal to this writer's perception of the social and planning realities underlying the laws of war. It should be added that, following Professor Jones, this writer has also used the terms "strategy" and "tactics" in the traditional sense. See *id.*, at p. 1, where the author stated:

An analytical approach to military operations permits one to divide the topic according to the three major components of the art of war: tactics, logistics, and strategy. Tactics should deal with combat and with the weapons, methods, and maneuvers on the battlefield. Logistics concerns providing the men themselves and the support of military operations, including the movement of armies and navies and the supply of weapons, food, clothing, and shelter for the soldiers and sailors. Strategy integrates tactics and logistics to determine the military objectives and the means of carrying them out. Naval warfare lends itself best to a separate treatment.

14. Professor Archer Jones, *id.*, at p. 55, also defines his seminal distinction between "raiding" and "persisting" strategies. He writes:

Whereas the former [*i.e.*, the "raiding strategy"] used a temporary presence in hostile territory, a persisting offensive strategy envisioned a longer, even permanent, occupation of the territory of the adversary or his allies. A persisting defensive strategy sought to prevent such an occupation. On both the defensive, and the offensive, the persisting strategy envisioned the possibility of conflict between the principal hostile forces; raiders, on the other hand, often could attain their objective without significant military conflict and frequently sought to do so.

It also should be pointed out that Professor Archer Jones distinguished offensive and defensive tactics, so that a force, following an offensive or raiding strategy might occupy a strong position and then follow defensive tactics. Of course, he also envisioned the opposite—a defensive strategy enforced by offensive tactics. But, in this chapter the use of defensive tactics for the purpose of putting raiders in a defensive posture will be treated as engaging in offensive conduct.

15. William Shakespeare, *The Tragedy of King Richard II*, act II, scene 1, line 48.

16. Hall, *supra* note 2, p. 642.



17. Hurst & Bray, *supra* note 2, v. 2, pp. 343-53.

18. This concept was explained in a letter of April 23, 1982, from the Permanent Representative of the United Kingdom to the President of the United Nations Security Council (S/14997), which stated, *inter alia*, that:

In this connection, Her Majesty's Government now wishes to make clear that any approach on the part of Argentine warships, including submarines, naval auxiliaries, or military aircraft which could amount to a threat to interfere with the mission of the British forces in the South Atlantic, will encounter the appropriate response. All Argentine aircraft including civil aircraft engaged in surveillance of these British forces will be regarded as hostile and are liable to be dealt with accordingly.

Quoted in Geoffrey Marston, ed., "United Kingdom Materials on International Law 1982," *British Yearbook of International Law*, v. 53, p. 337 at pp. 540-41 (1981) [hereinafter cited as Marston].

19. See Lawrence, *supra* note 2, pp. 83-93.

20. *Id.*, pp. 86-87.

21. These United States orders were reproduced in *American Journal of International Law (Supp.)*, v. 12, pp. 13-22 (1918). See Hall, *supra* note 2, p. 642.

22. Hall, *supra* note 2, p. 642. See also judgments of Lord Sumner in *The Stigstad*, 3 B & C. P.C. 347, 353, and *Ertel Bieber and Co. v. Rio Tinto Co., Ltd.*, [1918] A.C. 260, 287. Hall, *supra*, note 2, p. 643, at note 2, also refers to the early U.S. Naval War College Blue Book as approving of the Japanese orders. See *infra* note 23 and accompanying text.

23. Referring with approval to the *Quang Nam* case (which, of course, was prior to the Japanese orders), the influential Naval War College Blue Book offered the following solution to a problem based on the Japanese orders:

The master appeals to the commander of a cruiser of the United States to escort him through this area [i.e., a maritime exclusion zone similar to those proclaimed by Japan in 1904]. The voyage would not bring the vessels within 5 miles of the coast of State X [i.e., the belligerent proclaiming the zone in question].

What should the commander do?

#### SOLUTION

The commander should decline to escort the merchant vessel though the strategic area.

He should advise the master of the merchant vessel to keep clear of the strategic area.

Naval War College, *International Law Situations with Solutions and Notes* (Washington: U.S. Govt. Print. Off., 1912), pp. 114, 129.

24. Archer Jones, *supra* note 13, points out, at p. 488, that:

In former wars British blockades had hurt France's economy somewhat but had never had the effect that the [1914-18] blockade had on Germany, of reducing food consumption and handicapping industry because it had diminished or shut off the supply of such critical supplies as oil or copper. Never, too, had France's raiding strategy of attacking English ships come as near seriously menacing the British economy and ability to carry on the struggle as had the German submarine campaign against the allies. The navy's logistical strategy had acquired a new and perhaps decisive power in the industrial age.

25. *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, pp. 561-62, characterized reprisals in the following terms:

Whereas reprisals in time of peace are injurious acts committed for the purpose of compelling a State to consent to a satisfactory settlement of a difference created by an international delinquency, reprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare, in order to compel him . . . and members of his forces to abandon illegitimate acts of warfare. . . . They have often been used as a convenient cloak for violations of International Law.

26. For the British and Allied position in this regard, see *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, pp. 791-97, and Stone, *Legal Controls*, *supra* note 1, pp. 504-07, 508-10. More generally, for the British and

German positions on their blockades as being justified by belligerent reprisals, see Robert W. Tucker, *The Law of War and Neutrality at Sea* (Naval War College International Law Studies, v. XLX) (Washington: U.S. Govt. Print. Off., 1957), p. 301 [hereinafter cited as Tucker]. See also, Clive Parry et al., eds., *Encyclopaedic Dictionary of International Law* (New York: Oceana Publications, Inc., 1986), p. 337; Basdevant, *Dictionnaire de la Terminologie du Droit International*, (1960), pp. 529-30.

27. Howarth, *Sovereignty of the Seas* (1974), pp. 283-84.

28. Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum Public Order: The Legal Regulation of International Coercion* (New Haven: Yale Univ. Press, 1961), pp. 488-489 [hereinafter cited as McDougal & Feliciano].

29. *Id.*

30. See "Declaration Respecting Maritime Law," April 16, 1856, Martens, *Nouveau Recueil General*, v. 15, p. 791, art. 4 [hereinafter cited as Declaration of Paris of 1856]. Art. 4 of the Declaration provides:

Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

31. Naval Conference of London, "Declaration Concerning the Law of Naval War," Feb. 26, 1909, *Proceedings of the International Naval Conference, held in London, December 1908-February 1909* (London: H.M. Stationery Office, 1909), Cd. 4555, pp. 381-93; reprinted in Dietrich Schindler & Jiri Toman, *The Law of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3d ed. (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1988), p. 845 [hereinafter cited as Declaration of London of 1909]. Note that the qualifier "really" in the Declaration of Paris of 1856 was repeated in article 2 of the Declaration of London of 1909.

32. See Guichard, *The Naval Blockade 1914-1918* (Turbet transl. 1930), pp. 16-18 [hereinafter cited as Guichard].

33. See *infra* note 40 and the accompanying text.

34. See also *supra* notes 25 and 26 and the accompanying texts.

35. See Archer Jones, *supra* note 12, at p. 499. On realizing the utility of the submarine as a raider carrying out a devastating logistical strategy, Germany began building an impressive submarine fleet as fast as possible. She was not, however, able, by developing an adequate ratio of power to the vast spaces of the Atlantic Ocean, to develop a persisting strategy. Her submarines were only able to fulfill raiding strategy and so, despite German calculations, enough food, materiel, equipment, and American troops were able to cross the Atlantic to ensure her defeat.

36. *Id.*, Table 8.3, p. 468.

37. "Convention Relative to the Laying of Automatic Submarine Contact Mines," *supra* note 10, arts. 2-3.

38. See *supra* note 30.

39. Columbian-Peruvian Asylum Case, Judgment of November 20th, 1950, I. C. J. Reports 1950, p. 266, at p. 276.

40. Great Britain: Order-in-Council of August 20, 1914; France: Proclamation of August 23, 1914.

41. See *supra* text accompanying note 32 for the outline of the facts showing that it was in Germany's interest that the Declaration would govern the maritime commerce of both sides.

42. Guichard, *supra* note 32, at pp. 40-41.

43. *Id.*, p. 42.

44. Guichard, *supra* note 32, argues that the term "blockade of the Central Empires" was a misnomer, since the Entente Powers, who "had a very proper respect for the Declaration of Paris of 1856" which "prohibits the confiscation of enemy goods sailing under a neutral flag," merely seized and either sequestered or returned to their owners such goods and did not confiscate them. *Id.*, pp. 42-43. It may be noted, however, that Guichard also refers to "the blockade" and thereafter uses the word to describe the Entente's policy. *Id.*, p. 62.

45. See *supra* note 31 and texts accompanying notes 31-34; See also, Guichard, *supra* note 32, at pp. 13-19.

46. *Id.*, pp. 108-10. See also William S. Sims, *Victory at Sea* (1921), *passim*.

47. See, *supra* note 31 and accompanying text. See also, *supra* text accompanying notes 32-34 and Guichard, *supra* note 32, at pp. 13-19.

48. For a history of the negotiations of this affair, see Guichard, *supra* note 32, at pp. 196-202. Guichard there records the increasing cordiality of relations in the last months of World War I, including acceptance of the claims of the Allied and Associated Powers with regard to the long distance blockade.

49. See Guichard, *supra* note 32, at p. 97. For a history of this disastrously conceived piece of Hohenzollern diplomatic adventurism, see Barbara W. Tuchman, *The Zimmerman Telegram* (1958), *passim*, and especially chapters 11 and 12, entitled "The Telegram in Washington," and "Obliged to Believe It."

Tuchman believed that this latter activity on the part of Imperial Germany had a far stronger influence on the United States' entry into World War I than Germany's policy of unrestricted submarine warfare.

50. Guichard, *supra* note 32, at p. 96.

50. *Id.*, pp. 97-98.

51. March 3, 1918. Ratifications exchanged March 29, 1918. Denounced by the Russian Government, November 13, 1918. Abrogated by Articles 116 and 292 of the Treaty of Versailles, June 28, 1919, Martens, *Nouveau Recueil*, v. 9:1, 3 ieme Serie 323, British and Foreign State Papers, v. 112, p. 1 (1919).

52. See Guichard, *supra* note 32, at pp. 97-98.

53. "Order in Council Framing Reprisals for Restricting Further the Commerce of Germany," Stat. R. & O., 1939 No. 1709. Stone calls this "a very moderate measure." Stone, *Legal Controls*, *supra* note 1, p. 504. Writers and commentators have also expressed surprise at the three-month delay. See, for example, *id.*, p. 504, note 1, and the authors cited therein. Regulation of neutral trade with the enemy, however, became stricter under the Order-in-Council of June 11, 1940. "Order in Council Applying the Order in Council of November 27, 1939, to Italy," Stat. R & O, 1940 No. 979.

54. For the Italian protest and the United Kingdom's reply, see Cmd 6191 (1940) at pp. 2-7.

55. See "Order in Council Applying the Order in Council of November 27, 1939, to Italy," *supra* note 53.

56. The similar claims by the United Kingdom, and later the United Nations, of a right of reprisal because they associated themselves with Germany's methods of warfare at sea, were subsequently made against Finland, Hungary, and Rumania. See Stone, *Legal Controls*, *supra* note 1, p. 504.

57. *Id.*

58. United Nations, *History of the United Nations War Crimes Commission* (1948), p. 492.

59. "Treaty for the Limitation and Reduction of Naval Armament," April 22, 1930, U.S. Statutes at Large, v. 46, p. 2858, reprinted in Schindler & Toman, *supra* note 31, p. 881.

60. "Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930," Nov. 6, 1936, *American Journal of International Law* (Supp.), v. 31, p. 137 (1937), reprinted in Schindler & Toman, *supra* note 31, p. 883.

61. *Trial of the Major War Criminals Before the International Military Tribunal* (Nuremberg, Germany: International Military Tribunal, 1948), v. 22, pp. 556-61.

62. The case of the British auxiliary cruiser *Baralong* in 1916 illustrates the public outrage of that country at Germany's indiscriminate submarine warfare. See, [1916] British Parliamentary Papers, Misc. No. 1 [Cd. 8144], reprinted in *American Journal of International Law* (Supp.), v. 10, pp. 79-86 (1916). Catching the officers and crew of a German U-boat in the act of sinking a British merchant ship, the captain of the *Baralong* ordered their summary execution on the spot. On the German Government's demand that the British Government prosecute the latter's commander and her ship's company for murder and punish them according to the law of war, the British Government, without admitting the facts, justified the executions as retaliation against the ruthlessness of Germany's U-boat policy of unrestricted sinking of merchant ships. On the other side of the coin, see the German condemnation of the British policy of arming merchantmen and instructing them, as a last resort, to ram U-boats, even if signalled to stop and submit to visitation. This escalation of outrage culminated in Germany's conviction and execution, in July 1916, of Captain Fryatt, the commander of the merchant ship *Brussels* for having attempted, in March 1915, to ram the German submarine U-33. See *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, p. 468, where Germany's act was stigmatized as "nothing else than a judicial murder." See also James Brown Scott, "The Execution of Captain Fryatt," *American Journal of International Law*, v. 10, p. 865 (1916). In his article, Scott, a leading American international lawyer and Editor of the *Journal* at a time when the United States was still a neutral, stated categorically:

Ramming is an effective method of defense against a submarine and the fact that a submarine is a frail thing and cannot stand this kind of warfare is its misfortune, not the merchantman's fault. . . .

*Id.*, p. 877. Scott concluded his Editorial Comment with the following statement:

If the views above expressed are correct that there is nothing in the law nor in the practice of nations which prevents a belligerent merchant vessel from defending itself from attack and capture, the execution of Captain Fryatt appears to have been without warrant in international law and illegal, whatever it may have been according to the municipal ordinances of Germany.

*Id.* See also "The Brussels: Captain Fryatt's Case," Pitt Cobbett, *Leading Cases in International Law*, Walker 5th ed. (1937), v. 2, p. 131 [hereinafter Pitt Cobbett]. The author commented:

Germany seems to have been the first nation to question either the right of active self-defense or the legitimacy of defensively armed merchant ships. Practice appears to have been wholly against her contentions. With regard to war on land, however, different considerations apply.

*Id.*, p. 132. This last distinction was made because the German Government justified Captain Fryatt's execution on the ground that he was a *franc tireur*, that is, a civilian non-member of any fighting force who, without orders, snipes from behind cover at his unsuspecting enemy. Pitt Cobbett pointed out that the justification of making the *franc tireur* liable to "the severest treatment" has solid military reasons. "The essence of the *franc tireur* is not his commission of hostilities, but the element of treachery—he is a civilian one moment, a soldier the next. Having, as a peaceful civilian, watched the enemy soldiers pass, he then snipes at them from his cottage window." Pitt Cobbett finally contrasted the *franc tireur* with Captain Fryatt by pointing out that the *franc tireur* is under no form of discipline; there is no official superior to whom appeal can be made should he fail to observe the usages of war. Captain Fryatt, on the other hand, "though not a member of the armed forces of the Crown, was the head of a disciplined body of men, and was . . . acting under the advice of the British Admiralty." *Id.* In fact, it should be pointed out that Germany, perhaps not incorrectly, had, in both World Wars, insisted on treating the British Merchant Marine as a naval auxiliary service, since those ships travelled in convoys under armed escorts, were defensively armed and, whether travelling in convoy or not, or defensively armed or not, were required by the British Admiralty to take active measures of self-defense if attacked, to radio the position of any German U-boat seen by them, and to give the position of any observed underwater attack. If Germany argued this characterization of British merchant ships as naval auxiliaries in order to approbate their attacks on merchant ships, they should not have reprobated it in order to execute Captain Fryatt, whom they punished for being a civilian sniper, not a uniformed member of the auxiliary service.

63. For a comment on both the limited size of the area and the German maritime activity (invasion and occupation of Norway), see *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, p. 493, note 1.

64. This was one of the notorious "Leipzig War Crimes Trials" held in Germany in 1921. See *American Journal of International Law (Supp.)*, v. 16, p. 708 (1922). See also Pitt Cobbett, *supra* note 62, v. 2, pp. 156, 158.

65. *American Journal of International Law (Supp.)*, *supra* note 64, p. 722. This case should be contrasted with the *Dover Castle* case, *id.*, p. 704. The *Dover Castle* was also one of the Leipzig War Crimes cases. The vessel was a British hospital ship. She was clearly marked as such and was carrying no military personnel, munitions, or stores other than sick and wounded soldiers, members of the medical corps, and necessary supplies connected with that service. The accused commander of the submarine, Karl Neumann, was acquitted because the *Dover Castle* was sunk "in obedience to a service order of his highest superiors." *Id.*, p. 708. It should be noted that his latter case was distinguished from the *Llandovery Castle* also on the ground that the commander did not, as did Patzig, order the massacre of the survivors in lifeboats, or those on, or clinging to, rafts and wreckage, and in the water. See *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, p. 569. On the German Government's and High Command's policy, and order, of sinking hospital ships on sight, see *id.*, pp. 504-06, note 1. See also the British refusal to recognize the immunity of German seaplane ambulances in the English channel rescuing German airmen. *Id.* pp. 506-07.

66. The defenses of the "Laconia Order" (superior order commanding the killing of survivors of torpedoed ships) and of necessity were rejected. See *Law Report of Trials of War Criminals* (London: British Military Court, 1945), v. 1, p. 1 [hereinafter cited as *War Crimes Reports*].

67. *War Crimes Reports*, *supra* note 66, v. 9, p. 75. This case also involved the "Laconia Order."

68. *Id.*, v. 9, p. 82.

69. See Tucker, *supra* note 26, p. 72, note 55, where the author writes:

According to S. W. Roskill, with the one exception noted above [i.e., Helmuth von Ruchteschell], the captains of German armed merchant raiders "generally behaved with reasonable humanity towards the crews of intercepted ships, tried to avoid causing unnecessary loss of life and treated their prisoners tolerably." (footnote omitted)

70. Clearly the conflict between Argentina and the United Kingdom was a limited war, as to the participants, the area, and the weapons employed. For a quite detailed discussion of the seven zones proclaimed by both sides, for their characterization as "unusual," and for the comment that "[t]he rationale for these is difficult to determine," see William J. Fenrick, "The Exclusion Zone Device in the Law of Naval Warfare," *Canadian Yearbook of International Law*, v. 24, p. 92, at p. 107 (1987) [hereinafter cited as *Fenrick*]. This writer believes that, at least in part, the proclamation of these zones (except for the ill-advised last one proclaimed by Argentina, which was implicated in the unnecessary bombing of the tanker *Hercules*, see, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F. 2d 421 (2d Cir. 1987), reversed 109 S. Ct. 683 (1989)), helped to restrict the conflict to the disputed territory and localize the conflict. This writer agrees completely with Professor Howard S. Levie's comment in his contribution, "The

Falklands Crisis and the Law of War," in Alberto R. Coll and Anthony C. Arend, eds. *The Falklands War: Lessons for Strategy, Diplomacy and International Law* (Boston: George Allen & Unwin, 1985), p. 64 at p. 76 [hereinafter cited as Levie], where he listed the reasons why, in his opinion, the laws of war were able to exert their restraining influence:

First, this was a limited war, fought for limited ends with limited means. . . . The adversaries restricted their operations to the disputed territory, and refrained from military actions against the enemy's homeland; had it been conducted otherwise, the war would have been much more violent and destructive. . . .

71. The date 1982, shown in the text as that of the commencement of the Persian Gulf Tanker War, is predicated on the Iraqi attack on Kharg Island on April 29, 1982, and the Iraqi announcement of a Maritime Exclusion Zone in the Gulf on August 12, 1982. The Iran-Iraq War in general, although limited as to participants, and as to area (but note the so-called "War of the Cities"), was not limited as to weapons (note the substantiated resort to gas warfare by Iraq, the latest example of which at the time of writing was reported in "Gas Explosion in United Nations," *The Economist*, August 6, 1988, p. 31). One can be thankful that neither side had, apparently, nuclear devices. Unlike the Falklands Conflict, the Iran-Iraq war did not evidence restraints as to means and methods of warfare, nor in the treatment of prisoners.

72. See *infra* note 85 and accompanying text.

73. Marston, *supra* note 18, at p. 539.

74. See *supra* note 30 and the accompanying text.

75. Levie, *supra* note 70, p. 65.

76. Marston, *supra* note 18, pp. 540-41. See also the text accompanying note 18.

77. Marston, *supra* note 18, p. 549. See Levie, *supra*, note 70, p. 65. A further example of the British enforcement of "the Defensive Bubble" was the sinking of the Argentine "fishing vessel," the *Narwal*. She was shadowing the British forces and was "a spy ship with an Argentine Navy Lieutenant Commander on board sending back information about the [British] fleet's movements." Christopher Dobson et al., *The Falklands Conflict* (Falmouth, Cornwall: Coronet Books, 1982), p. 104. See also, Levie, *supra* note 70, p. 67 [hereinafter cited as Dobson et al.].

78. Marston, *supra* note 18, p. 542. See also for a discussion of the British MEZ of April 30, 1982, in light of the Doenitz Judgment, *supra* note 61, and the U.S. Navy Department's *Law of Naval Warfare* (NWIP 10-2) (Washington: U.S. Govt. Print. Off., 1955, as amended) [hereinafter cited as NWIP 10-2], in Fenrick, *supra* note 70.

79. Marston, *supra* note 18, p. 542.

80. *Id.*, p. 549. For enforcement of this zone, see letter dated May 1, 1982, addressed to the President of the Security Council from the Permanent Representative of the United Kingdom to the United Nations. Dobson et al., *supra* note 77, p. 546.

81. Marston, *supra* note 18, p. 549.

82. *Id.*

83. Levie, *supra* note 70, p. 66.

84. *Id.*

85. *Supra* note 70. The reversal of the Court of Appeals for the Second Circuit's judgment was on the ground that the Court of Appeals had erred in assuming jurisdiction over a foreign sovereign with regard to a claim that was not within the exceptions of the Foreign Sovereign Immunities Act of 1976. 28 U.S. Code § § 1330, 1332, 1391, 1441, and 1602, *et seq.*, especially § § 1604 and 1605. The Supreme Court also reversed the court below on the grounds: (1) That the United States' and Argentina's ratification of the Convention on the High Seas, Geneva, April 29, 1958, *United States Treaties and Other International Agreements*, T.I.A.S. No. 5200, v. 13, p. 2312, does not provide domestic United States courts with an independent basis of jurisdiction; and (2) the Alien Tort Statute of 1789, U.S. Code, Title 28, § 1750, does not provide an independent basis of jurisdiction. The Foreign Sovereign Immunities Act of 1976 provides the sole basis of jurisdiction in such cases.

86. *Amerada Hess*, *supra* note 70, p. 423.

87. *Id.*

88. It should be noted that the United States sought to protect the neutrality of the *Hercules*, and the Government emphasized her neutral status to the Argentine Government. The court stated that:

On May 23, 1982, *Hercules* embarked from the Virgin Islands, without cargo but fully fueled, headed for Alaska. On June 3, in an effort to protect United States interest ships, the United States Maritime Administration telexed to both the United Kingdom and Argentina a list of United States flag vessels and United States interest Liberian tankers (like *Hercules*) to ensure that these neutral vessels would not be attacked. The list included *Hercules*.

*Id.* See also the court's comment that "it is beyond controversy that attacking a neutral ship in international waters, without cause for suspicion or investigation, violates international law." *Id.*, p. 424.

89. See *Keesing's Contemporary Archives*, Aug. 7, 1981, v. 27, p. 31006 [hereinafter cited as *Keesing's*].

90. It should be pointed out that damaging attacks by both sides on their opponent's oil installations began as early as September and October 1980. *Id.*, pp. 31015-16. See also *id.*, June 4, 1982, v. 28, p. 31517. For an outline of the events concerning the exclusion zones in the Persian Gulf Tanker War, see Fenrick, *supra* note 70, pp. 116-22; Ross Leckow, "The Iran-Iraq Conflict in the Gulf: The Law of War Zones," *International and Comparative Law Quarterly*, v. 37, p. 629 (1988) [hereinafter cited as Leckow].

91. *Asylum Case (Colombia v. Peru)*, [1950] I. C. J., p. 266, at p. 276.

92. The Court added the requisite psychological element by saying "and . . . this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state." *Id.* See also Charles De Visscher, *Theory and Reality in International Law*, P.E. Corbett trans. (Princeton, N.J.: Princeton Univ. Press, 1957), pp. 148-49 [hereinafter cited as De Visscher], where the former World Court Judge wrote:

From the assimilation of custom to tacit convention, which in our judgment is quite fictitious, must be distinguished the requirement of *opinio juris sive necessitatis*, regarded here as reflecting the attitude of power in relation to a given practice. In its judgment of November 20, 1950, in the case of the right of asylum (Colombia-Peru)—a judgment which fixes its jurisprudence on this subject—the International Court of Justice clearly asserted the necessity of this psychological element of custom. (footnotes omitted)

93. See the quotation from De Visscher, *supra* note 92, and note 27 on that page in which the author discusses the definition in the *Asylum Case*. See also Statute of the International Court of Justice, art. 38, par. 1(b), which "recognizes the existence of a custom only if the practice which is its content has been 'accepted as law.'" De Visscher, *supra* note 92, at p. 441. Again, in the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), [1969] I.C.J., at p. 44, the Court reinforced its thesis in the *Asylum Case* with the statement that:

Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of the subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.

94. Stone, *Legal Controls*, *supra* note 1, p. 508.

95. *Id.*, at pp. 508-09. Stone took his quotation from *Statement of the Measure Adopted to Intercept the Seaborne Commerce of Germany*, Misc. No. 2, 1916, Cmd. 8145, p. 4.

96. See, e.g., Anthony A. D'Amato, *The Concept of Custom in International Law* (Ithaca, N.Y.: Cornell Univ. Press, 1971), p. 72, where he writes: "Kopelmanas, following the old theories of Puchta and Savigny, suggests that 'social necessity' is the basis of *opinio juris*." (Footnotes omitted)

97. Thus D. P. Simpson, *Cassell's New Latin Dictionary* (New York: Funk & Wagnalls Co., 1960), p. 778, tells us the use of *sive* "in an alternative conditional clause, whether . . . or . . . , *sive* (or *seu*) . . . *sive* (or *seu*) . . ." See also *id.*, p. 558, for its use in a disjunctive sense.

98. C.H.M. Waldock, "The Legal Basis of Claims to the Continental Shelf," *Grotius Society Transactions*, v. 36, p. 115, at p. 143 (1951). See also H. Lauterpacht, "Sovereignty over Submarine Areas," *British Yearbook of International Law*, v. 27, p. 376, at pp. 393-420 [hereinafter cited as Lauterpacht, *Submarine Areas*]; Gilbert Gidel, "The Continental Shelf" (L.F.E. Goldie trans.), *Annual Law Review* (Univ. of West Australia), v. 3, p. 87, at pp. 102-103 (1954-56); L.F.E. Goldie, "Some Comments on Gidel's Views," *id.*, p. 108, at 115-21; L.F.E. Goldie, "Australia's Continental Shelf: Legislation & Proclamations," *International and Comparative Law Quarterly*, v. 3, p. 535, at pp. 557-59 (1954). But see "Report of the International Law Commission to the General Assembly Covering the Work of its Eighth Session, 23 April-4 July 1956," U.N. Doc. A/3159, [1956] *Yearbook of the International Law Commission*, v. 2, p. 253, at pp. 295-99. Note especially commentary (8) on draft article 68. *Id.*, p. 298.

99. D. P. O'Connell, *Influence of Law on Sea Power* (1975), p. 165 [hereinafter cited as O'Connell, *Sea Power*].

When France was threatened by a plague of protesting yachts (which largely failed to materialize) the theoretical problem was deliberately made actual. Eventually, in 1973, France's notice to mariners went beyond declaring a *zone dangereuse* and for the first time in the history of nuclear testing amounted to a temporary appropriation of an area of the high seas from which all shipping could be excluded. One yacht was, in fact, boarded; but to hustle away H.M.N.Z.S. *Taranaki* or

*Canterbury* was another matter. The outcome was a maritime pavane, executed with some grace and disparity, in which New Zealand made her point and France continued her testing.

Had the International Court of Justice at the Hague found that the enclosure of the seas for the purpose of French nuclear testing was illegal, this might have ended speculation upon the legality of naval operational zones; if it had found that the enclosure was not illegal, it would have put a premium upon it. (footnotes omitted)

100. Myres S. McDougal and Norbert A. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," in Myres S. McDougal et al., *Studies in World Public Order* (New Haven, Conn.: Yale Univ. Press, 1960), pp. 763, 766-68, 802-07, and note 172, where, at the last citation, the authors point out that:

The United States has established well over 400 such areas [that is, areas designated in "warnings to mariners" or similar notes of dangers to navigation either indefinitely or at certain times], ranging in size from less than a square mile to the vast area surrounding the Bikini and Eniwetok atolls, and in duration from a period of a few hours to many years. Other naval powers, including the United Kingdom, Canada, Australia, and the Soviet Union, have engaged in the same practice for similar purposes. Ordinarily, no claim is made to enforce warning areas by means of formal sanctions, and the normal responsibility for taking reasonable measures at the scene to avoid accidents is considered to rest with the authorities using the area for dangerous operations. Some danger areas are, however, announced in terms which make clear that the authorities using them are expected to enforce observance.

In rare instances, criminal penalties are provided for unauthorized intrusions. In the Defence (Special Undertakings) Act of 1952, the Commonwealth of Australia created a prohibited area of more than 6,000 square miles, most of it high seas, surrounding one of the Monte Bello Islands in Western Australia, where atomic tests have been conducted by the United Kingdom. (authors' emphasis; footnotes omitted)

See also O'Connell, *Sea Power*, *supra* note 99, and the reference to the more recent French policy of creating sanctions for breaches of its prohibitions against vessels intruding into its South Pacific nuclear testing area.

101. See, e.g., Lauterpacht, *Submarine Areas*, *supra* note 98, pp. 393-98; J.D. MacGibbon, "Some Observations on the Part of Protests in International Law," *British Year Book of International Law*, v. 30, p. 293.

102. D'Amato, *supra* note 96, p. 99.

103. *Id.*

104. *Id.*

105. See *supra* text accompanying note 83.

106. See D'Amato, *supra* note 103, and quotation therefrom in accompanying text.

107. See *supra*, notes 84 and 85 and accompanying text.

108. The phrase "Military Economy" describes one of the "principles of war" (meaning, not legal rules but the prudential guides to waging a successful war) as prescribing that the commander should use enough force for the purpose of achieving his objective. It proscribes the alternative of squandering resources. Commanders, however, generally prefer to err on the side of "too much" rather than "too little, too late." Von Clausewitz writes, regarding this principle:

In this manner, he who undertakes War is brought back again into the middle course, in which he acts to a certain extent upon the principle of applying so much force and aiming at such an object in War as is just sufficient for the attainment of its political object.

Karl von Clausewitz, *On War*, Graham transl., 1908 Anatol Rapoport ed. (London: Penguin Classics, 1968), p. 375 [hereinafter cited as Clausewitz]. See also *id.* at p. 423, note 59, where the editor, Dr. Anatol Rapoport observes:

Here Clausewitz admits a rational basis for a limited war. Still, in his view, the limitation of military objectives depends entirely on the political objectives, that is, war effort is to be commensurate with what is demanded from the enemy and what can be achieved.

See also Archer Jones, *supra* note 13, at pp. 630-34 and 670-75.

109. Clausewitz always saw "absolute war" as being subject to "three modifying factors;" but he defined it for heuristic purposes as embodied in a contest that can "spring up quite suddenly and spread to the full in a moment" and consist of a "single absolute blow wreaking irreparable harm upon the enemy," that is, a harm in absolute terms "from which he may never recover." Such a blow is not "a passing evil." See Clausewitz, *supra* note 108, pp. 367-71. See also L.F.E. Goldie, "Book Review," *Southern California Law Review*, v. 36, p. 636, note 34 (1963). This review discussed, and at times compared, two annotated translations of General V.D. Sokolovskii, *Soviet Military Strategy*, Dinerstein et al. trans., Rand Corporation Research Study (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1963), and V.D. Sokolovskii, *Military Strategy*, Richard Garthoff trans. (New York: Frederick A. Praeger, Inc., 1963). It should be noted that the accurate translation of the book's title from the Russian original is "Military Strategy."

110. See *supra* quotation accompanying note 108, and especially the reference to "military economy" at that place.

111. *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, p. 218 (emphasis supplied).

112. The "three limiting factors" Clausewitz described in "real," as distinct from "philosophical," war were: (1) The "non-conducting medium which hinders the complete discharge" of the will to wage war. This includes "the number of interests, forces and circumstances of various kinds . . . which are affected by the War through the infinite ramification of which logical consequences cannot be carried out . . . ;" (2) "The natural inertia and friction" of the parts that go into making of a "real war" as distinct from Clausewitz's "philosophical war;" and (3) The "vagueness and hesitation (or timidity) of the human mind." Clausewitz, *supra* note 108, pp. 368-69. Note also Clausewitz's comment, "Activity in war is movement in a resistant medium." *Id.*, p. 165.

113. *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, pp. 226-36; Stone, *supra* note 1, Discourse 18, "Ideological and Technological Factors in the Evolution of the Law of War," pp. 335-41.

114. Clausewitz, *supra* note 108, at 267-70.

115. *Id.*

116. *Id.*, pp. 102-03. Here Clausewitz defines his thesis of the "utmost use of force" with the conclusion that, "We therefore repeat our proposition, that War is an act of violence pushed to its utmost bounds; as one side dictates the law to the other, there arises a sort of reciprocal action."

117. *Id.*

118. *Id.*

119. Levie, *supra* note 70, p. 76. See also Clausewitz, *supra* note 108, p. 403, where that famous author gives us the following interesting metaphor:

Thus policy makes out of the all-overpowering element of War a mere instrument, changes the tremendous battle-sword, which should be lifted with both hands and the whole power of the body to strike one and for all, into a light handy weapon, which is even sometimes nothing more than a rapier to exchange thrusts and feints and parries.

120. Roger Trinquier, *Modern Warfare*, Daniel Lee trans. 1964, (first published in French in 1961), pp. 19-20 and *passim*. Indeed Trinquier quoted Clausewitz's stigmatization of "self-imposed restrictions" as equally applying in guerilla warfare where Clausewitz's maxim "to introduce into the philosophy itself a principle of moderation would be an absurdity" also applies. *Id.*, p. 22.

121. *Lauterpacht's Oppenheim*, *supra* note 1, v. 2, pp. 796-97. See also S. W. D. Rowson, "British Prize Law, 1939-1944," *Law Quarterly Review*, v. 61, p. 49 at p. 57 (1945), where the author states:

In this war, except in the case of Germany, reprisals were instituted immediately war was declared, and in effect it was the outbreak of the war that was the breach of international law which gave His Majesty the right to initiate reprisals. One cannot help feeling that the time has come to remove any notion that such measures, by being termed reprisals, are extraordinary. Rather should it be made clear to the world in time of peace that in the event of this country being involved in war, the whole system of economic warfare as in force in this war will be reintroduced. It is now clear to all that neutrals cannot carry on during a major war without any interference whatsoever, and it is suggested that the certainty that these measures would be adopted if occasion required would be a valuable addition to the sanctions behind any new international order. In this connection it is interesting to recall that in both the last and the present wars the neutral nations who were most vociferous in their complaints of the British exercise of belligerent rights at sea have ultimately become allied to Great Britain and shared in the advantages of her system of waging economic warfare.

122. See *supra* § II.D.

123. James Mitchell, ed., *The Random House Encyclopedia* (New York: Random House, 1977), p. 2576.

124. *Id.*, p. 2463.



125. *Supra*, note 70. See also, text accompanying notes 85-87.

126. See *supra* note 121 and accompanying text. See also, Stone, *Legal Controls*, *supra* note 1, at p. 510, and quotation from Stone accompanying note 129, *infra*.

127. Leckow, *supra* note 90, at pp. 635-36.

128. *Id.*, p. 635.

129. Stone, *supra* note 1, pp. 606-07 (footnote omitted).

130. See *supra* text accompanying note 73.

131. Fenrick, *supra* note 70, p. 124.

132. See *supra* text accompanying notes 21-23.

133. See *supra* quotation in text accompanying note 75. See also Levie, *supra* note 70, at p. 65, where he also wrote of this early proclamation, "However, this was a perfectly valid and successful piece of 'disinformation' by the British;" and more generally, the permissible use of misinformation as a *ruse de Guerre*. O'Connell, *Law of the Sea*, *supra* note 9, v. 2, p. 1140.

134. See Leckow, *supra* note 90, p. 634, where he demonstrated that the British forces satisfied the proportionality requirement. He wrote:

Ships regarded as hostile were subject to attack without warning. In order to claim the status of "non-hostile", vessels required the authorisation of the Ministry of Defence in London. Adopting a very balanced approach, Britain sought to apply the measures primarily against craft engaging in military operations. Argentinian merchant ships were permitted to enter the zone with British approval. Refining the procedures of the two world wars, Britain precisely defined the limits of the area and provided ample notification to all parties. Further, Britain was careful to observe proportionality, the system being enforced with a minimum of violence. Thus, British forces avoided any conflict with neutral ships. Even unauthorised Argentinian merchant craft were merely compelled to leave the area with no incidents of direct attack occurring. (footnotes omitted)

135. See *supra* notes 18, 76-80, 125 and accompanying texts.

136. United Nations, Security Council, Resolution 502, April 3, 1982, reprinted in *International Legal Materials*, May 1982, v. 51, p. 679.

137. See O'Connell, *Law of the Sea*, *supra* note 9, pp. 1097-98. See also O'Connell, *Sea Power*, *supra* note 99, at pp. 76-77.

138. *Commander's Handbook*, *supra* note 4, par. 7.7.5. See also text accompanying note 8 *supra*.

139. *Supra* note 136.

140. See *supra* text accompanying notes 85-88.

141. O'Connell, *Law of the Sea*, *supra* note 9, v. 2, p. 1099.

142. *Id.*

143. *Id.*

144. *Id.* In commenting on the situation, O'Connell also states:

The naval operations conducted by India against the port of Karachi and in the Gulf of Bengal took no account of international law, which was, indeed deliberately put to one side by the Indian naval staff.

145. See *supra* text accompanying notes 16-18.

146. See *supra* text accompanying notes 21-23.

147. See *supra* text accompanying notes 35-36.

148. See *supra* notes 64-69 and accompanying text.

149. See *supra* text accompanying note 67.

150. See *supra* text accompanying note 66.

151. See *supra* text accompanying note 76.

152. O'Connell, *Sea Power*, *supra* note 99, p. 168.

153. "The Nyon Agreement," Sept. 14, 1937, *League of Nations Treaty Series*, v. 181, p. 137, reprinted in *American Journal of International Law (Supp.)*, v. 31, p. 183 (1937); and "Agreement Supplementary to the Nyon Agreement," Sept. 14, 1937, *League of Nations Treaty Series*, v. 181, p. 151, reprinted in *American Journal of International Law (Supp.)*, v. 31, p. 183 (1937). For a history and commentary on the Nyon Agreements, see, L.F.E. Goldie, "Commentary [on the 1937 Nyon Agreements]," in N. Ronzitti, *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1988), p. 489.

154. O'Connell, *Sea Power*, *supra* note 116, p. 168.